

ARTICLE

Special Issue: The Resurgence of the State as an Economic Actor—International Trade Law and State Intervention in the Economy in the Covid Era

## The EU Trade Agenda—Rules on State Intervention in the Market

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### Abstract

This Article critically analyzes the main legal and policy issues that are likely to determine the development of the EU's trade policy concerning rules on State intervention in the market, specifically on subsidies and SOEs. The article assesses the aforementioned issue especially within the context of the new trade strategy entitled “An Open, Sustainable and Assertive Trade Policy” set out by the European Commission in February 2021, at the core of which stands the concept of *strategic autonomy*. The focus of our analysis is on key elements of the current EU competition and trade policies and normative initiatives, namely: the relaxation of the usual State aid regime under Articles 107 and 108 TFEU to give Member States more flexibility in supporting their economies and strengthen EU industrial policy; the likelihood of EU proposals resulting in any substantial change to international trade law on subsidies and SOEs at the multilateral (WTO) level; a systemic horizontal investigation into the relevant trade rules promoted by the EU in its most recent practice of PTAs; and, finally, the EU pursuing stronger protection of its companies with its recently announced new regulation on foreign subsidies, on the basis of which the European Commission can investigate foreign subsidies and impose remedies. Even though, at first sight, it may seem that the current evolution of the EU trade policy on these issues seems inconsistent, the Article argues that the unilateral, bilateral, and multilateral approaches are indeed strictly intertwined, and they reveal a significant shift in the most recent EU trade policy objective in relation to the role of State in the market.

**Keywords:** SOE; State aid; WTO; Preferential Trade Agreements; Article 107 TFEU

### A. Introduction

The purpose of this Article is to critically analyze the issue of trade regulation of State Owned Enterprises (SOEs) and subsidies in the current evolution of EU Trade Agenda, and especially within the context of the new strategy entitled “An Open, Sustainable and Assertive Trade Policy” set out by the European Commission in February 2021.<sup>1</sup> This new trade strategy was presented as an answer to global economic upheavals from supply chain disruptions to unfair trade

\*This article is the outcome of a joint effort of both authors. However, Sections A, B, C and D are to be attributed to Stefano Silingardi, while Nerina Boschiero wrote Sections E and F.

<sup>1</sup>Commission Trade Policy Review - *An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final (Feb. 18, 2021).

practices. The US protectionist unilateral measures adopted under the Trump presidency;<sup>2</sup> China's assertive state policies to support and expand industries vital to its most strategic interests—notably, ITC, energy, agro-technology, defense, infrastructure, finance;<sup>3</sup> the World Trade Organization's ("WTO") deep crisis as a forum for the negotiation of new trade agreements and the demise of its Appellate Body are only the most salient aspects/outcomes of these national *go-it-alone* strategies that largely contributed to the worsening of the geo-economic and trade tensions among the major trading powers, and somehow former allies—China, USA and the EU.<sup>4</sup> The outbreak of the Covid-19 global pandemic has further accelerated and focused attention on these shifts, revealing, among others, the EU's vulnerability to foreign competitors that enjoy state support.

Against this backdrop, the new EU trade strategy includes a series of headline actions to contribute to economic recovery. On the one end, it advocates for support for the green and digital transformations, as well as a renewed focus on strengthening multilateralism and reforming global trade rules to ensure that they are fair and sustainable. At the other end, at the core of this new agenda stands the quite opposite concept of *strategic autonomy*, which the EU Commission describes in quite ambiguous and self-centered terms (see, *infra*, Section F) as "the EU's ability to make its own choices and shape the world around it through leadership and engagement."<sup>5</sup> The shift in EU discourse about autonomy and sovereignty in economic policy is particularly in relief when contrasted to previous decades, in which the EU proclaimed itself a leader of the liberal economic order characterized by economic openness: free trade, freedom of capital movement, balanced budgets, export competitiveness, and non-intervention by the state.<sup>6</sup>

Following the different threads of the debate hosted in this Special Issue, we will focus our attention on whether an *open* and an *autonomous* approach to economic policy could coexist. As the EU Commission Communication's makes it very clear, the EU approach to these matters is based at the same time on *openness* to trade and investment for the EU economy to recover from the crisis and remain competitive, as well as on *assertiveness* and *rules-based cooperation* to showcase "the EU's preference for international cooperation and dialogue, but also its readiness to combat unfair practices and use autonomous tools to pursue its interests where needed."<sup>7</sup>

As a preliminary remark, it is worth noting that the use of official EU policies to bolster the development of the EU economy and its industrial policy seems based more on a bottom-up, States-driven approach rather than on a top-down, EU institutions driven approach. Already in 2019, some European industries and politicians indeed favored a more active role for the

<sup>2</sup>See Thomas J. Schoenbaum, *The Biden Administration's Trade Policy: Promise and Reality*, in this special issue.

<sup>3</sup>See Ming Du, *Unpacking the Black Box of China's State Capitalism*, in this special issue; Petros Mavroidis & André Sapir, *China in the WTO Twenty Years On: How to Mend a Broken Relationship?*, in this special issue.

<sup>4</sup>See generally Bernard Hoekman, Xinquan Tu & Robert Wolfe, *China and WTO Reform*, (RSC Working Paper 2022/59, 2022); Bernard Hoekman & Douglas Nelson, *Rethinking International Subsidies Rules*, 43 *WORLD ECON.* 3104 (2020); PETROS C. MAVROIDIS & ANDRÉ SAPIR, *CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS* (2021).

<sup>5</sup>*Commission Trade Policy Review*, *supra* note 1, at 4. The concept of strategic autonomy is not new, though. It was originally introduced at the end of the 1990s as an aim for the EU's security and defense policy. See Joint Declaration on European Defence, Fr.-U.K., Dec. 4 1998, [https://www.cvce.eu/content/publication/2008/3/31/f3cd16fb-fc37-4d52-936f-c8e9bc80f24f/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2008/3/31/f3cd16fb-fc37-4d52-936f-c8e9bc80f24f/publishable_en.pdf).

However, given the increased use of economic and trade instruments for geostrategic goals over the last decade, that concept has acquired a fundamental relevance also in the economic and trade contexts. See Josep Borrell, *Why European Strategic Autonomy Matters*, EUR. UNION EXTERNAL ACTION (Dec. 3, 2020), [https://www.eeas.europa.eu/eeas/why-european-strategic-autonomy-matters\\_en](https://www.eeas.europa.eu/eeas/why-european-strategic-autonomy-matters_en) ("Strategic autonomy has been widened to new subjects of an economic and technological nature, as revealed by the Covid-19 pandemic..."). See also Niklas Helwig & Ville Sinkkonen, *Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term*, 27 *EUR. FOREIGN AFF.'S* 1–19 (2022); Mark Leonard, Jean Pisani-Ferry, Elina Rybakova, Jeremy Shapiro & Guntram Wolff, *Redefining Europe's economic sovereignty*, BRUEGEL POLICY BRIEF (June, 24 2019), <https://www.bruegel.org/policy-brief/redefining-europes-economic-sovereignty>.

<sup>6</sup>See Tobias Gehrke, *EU Open Strategic Autonomy and the Trappings of Geoeconomics*, 27 *EUR. FOREIGN AFF.'S* 61, 62–63 (2022).

<sup>7</sup>*Commission Trade Policy Review*, *supra* note 1, at 5.

EU in order to ensure a level playing field, not only through its trade diplomacy “but also through developing a more active industrial policy and transforming its approach to competition policy.”<sup>8</sup> This was especially the case for Germany. In early February 2019, the German Minister of Economic Affairs and Energy, Peter Altmaier, supported by the highly influential Federation of German Industries, unveiled the National Industrial Strategy 2030.<sup>9</sup> Mainly driven by the necessity to confront Chinese capitalism, this plan advocates far-reaching, targeted, and strategic industrial policy interventions to selectively promote “game changer” technologies, to build “national and European champions” large enough to persist in world market competition, to maintain and promote “industrial and technological sovereignty” by reshoring global value chains, and to prevent foreign take-overs of key technology firms through tightened FDI-screening and a “national participation facility.”<sup>10</sup> Only a couple of weeks later a joint French-German “Manifesto for a European industrial policy fit for the 21<sup>st</sup> century” was launched, which called, *inter alia*, for greater flexibility in EU merger control by taking into consideration the state-control of and subsidies for undertakings, and demanded the Commission to take into account the potential for future global competition when assessing relevant markets and to address third country state support in merger control.<sup>11</sup> Despite encountering adverse reactions from smaller Member States and the initial opposition of the European Commission for misrepresenting the reality of its merger regime,<sup>12</sup> in 2020 France and Germany reiterated their call for “moderniz[ing] European competition policy by accelerating the adaptation of State aid and competition rules”, and for “adapting the competition rules . . . to help European champions emerge.”<sup>13</sup> Finally, in October 2021—following a European Council summit—President Michel concluded as follows: “We will reduce dependencies and achieve resilience in areas such as energy, digital, cyber security, semi-conductors, industrial policy, trade and reinforcing the single market.”<sup>14</sup>

In light of such developments, we seek to answer two key questions: First, how the proposals on strengthening subsidies and SOEs regulations advanced in the new EU trade agenda take into account the increasing importance given across the globe to the use of economic statecraft<sup>15</sup> as a means to seek advantage in economic sectors deemed to be strategically important? Second, what role do the multilateral, the bilateral, and the unilateral approaches endorsed by the EU trade agenda play in rewiring the international trade rules on States intervening in the market?

Our main finding is that the recent trade and geo-economic tensions fostered by national *go-it-alone* strategies have accelerated ongoing changes even at the EU level. Insofar as these

<sup>8</sup>Jean-Christophe Defraigne, Edoardo Traversa, Jan Wouters & Dimitri Zurstrassen, *Introduction to EU Industrial Policy in the Multipolar Economy: past lessons, current challenges and future scenarios*, in EU INDUSTRIAL POLICY IN THE MULTIPOLAR SCENARIO 1, 5 (Jean-Christophe Defraigne, Edoardo Traversa, Jan Wouters & Dimitri Zurstrassen, eds. 2022).

<sup>9</sup>See FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY, NATIONAL INDUSTRIAL STRATEGY 2030: STRATEGIC GUIDELINES FOR A GERMAN AND EUROPEAN INDUSTRIAL POLICY (2019).

<sup>10</sup>See, e.g., Defraigne et al., *supra* note 8, at 5; Etienne Schneider, *Germany's Industrial strategy 2030, EU competition policy and the Crisis of New Constitutionalism (Geo-)political economy of a contested paradigm shift*, N. POL. ECON. 1 (2022).

<sup>11</sup>See A Franco-German Manifesto for a European industrial policy fit for the 21<sup>st</sup> Century, Fra.-Ger., Mar. 19, 2019, [https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F\\_\\_blob%3DpublicationFile%26v%3D2](https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2).

<sup>12</sup>See Sophie J Meunier & Justinas Mickus, *Sizing up the competition: explaining reform of European Union competition policy in the Covid-19 era*, 42 J. EUR. INTEGRATION 1077 (2020).

<sup>13</sup>Defraigne et al., *supra* note 8, at 5 (quoting the German Chancellor Merkel and the French Minister for the Economy and Finance Bruno Lemaire).

<sup>14</sup>Charles Michel, President, European Council, Oral Conclusions Drawn by President Charles Michel Following the Informal Meeting of the Members of the European Council in Brdo pri Kranju Slovenia (Oct. 6, 2021), <https://www.consilium.europa.eu/en/press/press-releases/2021/10/06/oral-conclusions-drawn-by-president-charles-michel-following-the-informal-meeting-of-the-members-of-the-european-council-in-brdo-pri-kranju-slovenia/>.

<sup>15</sup>See Vinod K. Aggarwal & Andrew W. Reddie, *Economic Statecraft in the 21st Century: Implications for the Future of the Global Trade Regime*, 20 WORLD TRADE REV. 137 (2021) (providing an insightful analysis of the use of “economic statecraft” across the globe and the use of industrial policy, trade measures and investment regulation as key components of economic statecraft).

developments may encroach too deeply on the traditional openness of the EU trade regime, and given the limitations posed by international politics towards obtaining a political global consensus regarding a modernization of subsidies and SOEs rules at the multilateral WTO level, this would feed a reassessment of the EU towards a very aggressive unilateral posture. As these developments would have irreparable consequences on the current very fragile trade environment, a strong coordinated response at the multilateral level became preferable. For these reasons, the EU legislative proposal of a new regulation to address distortions caused by foreign subsidies on the EU's internal market should be seen as a strong "political signal" to third countries that bilateral or multilateral trade agreements remain the best solution to reach a fair, predictable, and consensual regime, able to guarantee legal certainty.

Our argument proceeds as follows. Section B introduces the EU legal framework on State aid rules, and then analyses the relaxation of such rules in response to the Covid-19 global pandemic to promote European industrial autonomy in critical supply chains. Section C explores the most recent EU proposals on how to modernize the WTO rules on subsidies and SOEs. Section D then provides a systemic horizontal investigation into the relevant trade rules promoted by the EU in its Preferential Trade Agreements ("PTAs"), which have been concluded, or are currently under negotiation, at the bilateral level. Rooted in frustration with the old multilateral rules, provisions on subsidies and SOEs included in recent EU PTAs indeed dissolve some uncertainties left open by WTO law. As the recently announced open, sustainable, and assertive trade strategy also includes the possibility for the EU to pursue stronger protection of European companies at the unilateral level, Section E then analyzes how the EU is developing new trade tools aiming at protecting European companies and citizens from alleged unfair trading practices. Specifically, the proposal of a new regulation to address distortions caused by foreign subsidies on the EU's internal market, which extends the application of EU State aid laws to subsidies granted by foreign countries, is critically discussed. Finally, the conclusion revisits the research questions and argues that the unilateral, bilateral, and multilateral approaches are indeed strictly intertwined, and they reveal a shift in the most recent EU trade policy objectives concerning the role of State in the market.

## B. The Relaxation of EU State Aid Rules in Response to the Covid-19 Global Pandemic Crisis

State aid control is commonly understood as a true peculiarity of the EU legal order.<sup>16</sup> There is indeed no other legal system in the world that contains a comparable principle prohibiting government support for companies.<sup>17</sup> The fundamental provision on the regulation of state aid in the EU legal framework is to be found in Article 107 TFEU, which contains both the general prohibition to grant state aid as well as categories of aid that shall, or may be, compatible with the internal market. According to Article 107 (1), the notion of state aid is as follows:

[A]ny aid granted by a Member State or through State resources in any forms whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods . . . in so far as it affects trade between Member States.<sup>18</sup>

<sup>16</sup>See Tim Maxian Rusche, *Article 107 TFEU*, in *THE EU TREATIES AND CHARTER OF FUNDAMENTAL RIGHTS* 1111 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin, eds. 2019).

<sup>17</sup>At the global level, government support for companies is modeled upon the regulation provided by the WTO Agreement on Subsidies and Countervailing Duties (SCM Agreement) that contains a less stringent subsidy discipline. See Luca Rubini, *THE DEFINITION OF SUBSIDIES AND STATE AID* (2009); see also Luca Rubini, *State aid and international trade law*, in *RESEARCH HANDBOOK ON EUROPEAN STATE AID LAW* 103–33 (Leigh Hancher & Juan J. Piernas Lopez, eds. 2021).

<sup>18</sup>Treaty on the Functioning of the European Union art. 107, 2008 O.J. (C115) 91–92 [hereinafter TFEU].

To be state aid, a measure thus needs to comprise four cumulative conditions: (i) there has been an *intervention by the State* or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.); (ii) the intervention *grants an advantage* to the recipient on a selective basis—for example to specific companies or industry sectors, or to companies located in specific regions); (iii) as a result, *competition has been or may be distorted*; and (iv) the intervention is likely to *affect trade between Member States*. As a preliminary observation, it is useful to note that the definition of state aid under EU law is, for many and different reasons, broader than the notion of subsidies under WTO law.<sup>19</sup>

In principle, state aids that fulfill the requirements of Article 107(1) are prohibited. Meanwhile, that prohibition is softened by a set of derogations laid down in Article 107 (2) and (3). Subsidies pertaining to the former type are automatically compatible with no discretion by the Commission, those pertaining to the latter type are compatible pending the Commission's approval. The competence to apply and enforce Article 107 TFEU is attributed to the Commission under article 108 TFEU.<sup>20</sup> This provision distinguishes between existing aid (para 1), which is subject to constant review, and new aid (par. 2), which is subject to an obligation to notify to the Commission.<sup>21</sup> The provisions of the TFEU are supplemented by Regulation No. 2015/1589, of 13 July 2015,<sup>22</sup> which repeats the classification of Article 108 and completes it by distinguishing depending on whether the aid is a notified, existing, unlawful or misused aid. Further, the General Block Exemption Regulation (GBER) No 651/2014, of 17 June 2014, exempts from the obligation of prior notification new aid that meets the criteria for exemption set out in it.<sup>23</sup>

The Covid-19 global pandemic has quickly made a clean sweep of many taboos in European politics, involving also some orthodox approaches to state intervention in the market and rules on competition policy. One of the key decisions taken by the EU in this field has been to temporarily relax the usual state aid regime under Articles 107 and 108 TFEU to give Member States more flexibility in supporting their economies.<sup>24</sup> On March 19, 2020, the European Commission adopted a Temporary Framework<sup>25</sup> outlining *ex-ante* which aid measures were likely to be considered compatible under Article 107 (3)(b) TFEU.<sup>26</sup> The approach chosen was to specify the basic

<sup>19</sup>See Maxian Rusche, *supra* note 16, at 1116 (“[T]he notion of ‘benefit’ is narrower than the notion of ‘advantage’ under 107(1) TFEU, because the latter takes as its point of comparison not the situation absent the state intervention, but that following regulatory intervention of the state. Furthermore, the notion of ‘specificity’ under the agreement is also less broad than the notion of ‘selectivity’. In addition, the ‘state resources’ requirement may be less stringent than under the SCM Agreement, where ‘entrustment and direction’ suffice.”).

<sup>20</sup>TFEU, *supra* note 18.

<sup>21</sup>See Tim Maxian Rusche, *Article 108 TFEU*, in THE EU TREATIES AND CHARTER OF FUNDAMENTAL RIGHTS 1167 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin, eds. 2019).

<sup>22</sup>2015 O.J. (L248) 24

<sup>23</sup>2015 OJ (L187) 26.

<sup>24</sup>See, e.g., Federico Fabbrini, *The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic*, 60 J. COMMON MKT. STUDIES 186 (2022) (presenting an overview of the set of measures adopted by the EU to address the devastating economic effects of COVID-19); Bruno de Witte, *Guest Editorial – EU Emergency Law and its Impact on the EU Legal Order*, 59 COMMON MKT. L. REV. 3, 4 (2022) (affirming that these measures can be conceptualized as *EU emergency laws*, which “refer to the rules of primary and secondary EU law that serve to address sudden threats to the core values and structures of the Union and its Member States . . .”).

<sup>25</sup>2020 O.J. (C91) 1.

<sup>26</sup>See European Commission Press Release IP/20/459, COVID-19: Commission Sets Out European Coordinated Response to Counter the Economic Impact of the Coronavirus (Mar. 13, 2020); *Coronavirus Outbreak - List of Member State Measures Approved Under Articles 107(2)B, 107(3)B AND 107(3)C TFEU and under the State Aid Temporary Framework* (Dec. 20, 2022), [https://competition-policy.ec.europa.eu/system/files/2022-08/State\\_aid\\_decisions\\_TF\\_and\\_107\\_2b\\_107\\_3b\\_107\\_3c\\_1.pdf](https://competition-policy.ec.europa.eu/system/files/2022-08/State_aid_decisions_TF_and_107_2b_107_3b_107_3c_1.pdf) (showcasing a comprehensive list of measures adopted by Member States, and approved by the Commission, that fall under these derogatory categories).



requirements for compatible State aid measures to be cleared by the Commission,<sup>27</sup> removing the need for the detailed (and lengthy) case-by-case assessment procedure under Article 108 TFEU. In such a way, the Commission allowed Member States to inject substantial amounts of public money, totaling dozens or even hundreds of billions of euros,<sup>28</sup> into their economies “at the speed of light.”<sup>29</sup>

After a series of subsequent amendments intended to extend its scope,<sup>30</sup> the EU finally decided to put an end to the Temporary Framework, which expired on June 30, 2022.<sup>31</sup> As of that date, the EU Commission has adopted more than 1,350 decisions, approving more than 980 State aid measures for an estimated total of more than €3.2 trillion over a span of two and a half years.<sup>32</sup> Investment and solvency support measures, however, may still be put in place until December 31, 2022 and December 31, 2023 respectively. In addition, the Temporary Framework provides for a flexible transition—under clear safeguards—for the conversion and restructuring options of

<sup>27</sup>The Temporary Framework enabled Member States to provide support through direct grants, or tax advantages, of up to €1.8 million to a company; State guarantees for loans taken by companies from banks; public loans with favorable subsidized interest rates to companies; safeguards for banks that channel support to businesses of all sizes; additional short-term export credit insurance to be provided by the state.

<sup>28</sup>See, e.g., See European Commission Press Release IP/20/503, State aid: Commission approves French schemes to support economy in Coronavirus outbreak (Mar. 21, 2020) (French guarantee program designed to mobilize more than €300 billion in liquidity support for companies affected the Coronavirus outbreak approved just 48 hours after the entry into force of the Temporary Framework); see also European Commission Press Release IP/20/596, Commission approves Polish scheme enabling public guarantees up to €22 billion to support economy in coronavirus outbreak (Apr. 3, 2020) (showing a €22 billion Polish scheme accessible by all medium and large Polish companies, allowing for the provision of public guarantees on investment loans and working capital loans by the Polish National Development Bank); European Commission Press Release IP/20/599, State aid: Commission approves €13 billion Portuguese schemes to support economy in coronavirus outbreak (Apr. 4, 2020) (discussing two Portuguese schemes, with a budget of €13 billion, to support small and medium enterprises through direct grants and State guarantees for investment and working capital loans granted by commercial banks); European Commission Press Release IP/20/1668, State aid: Commission approves €44 billion Italian recapitalisation scheme to support large companies affected by coronavirus outbreak (Sept. 17, 2020), (expedited review of a €44 billion Italian scheme to support large companies through recapitalization instruments). See generally Julia Anderson, Francesco Papadia & Nicolas Véron, *Covid-19 credit-support programme: Europe's five largest economies*, BRUEGEL WORKING PAPER 03/2021 (Feb. 24, 2021) (discussing the measures adopted by some Member States in the weeks immediately following the Covid-19 outbreak).

<sup>29</sup>Andrea Biondi, *State Aid in the Time of COVID-19*, EU L. LIVE (March 25, 2020), <https://eulawlive.com/op-ed-state-aid-in-the-time-of-covid-19-by-andrea-biondi/>; see also Delia Ferri, *The Role of EU State Aid Law as a “Risk Management Tool” in the COVID-19 Crisis*, 12 EUR. J. OF RISK REGUL. 176 (2021). It is true, on the one hand, that derogations under Article 107 (2) (b) (“aid to make good the damage caused by natural disasters or exceptional occurrences”); 107 (3) (b) (“aid to . . . remedy a serious disturbance in the economy of a Member State”) and (c) (“aid to facilitate the development of certain economic activities”) were in theory available for Member States. The general regime, however, does not allow massive amounts of State aid to be injected in the market, then it resulted inadequate to provide an effective response to the acute economic crisis that followed the Covid-19 pandemic.

<sup>30</sup>See 2020 O.J. (C 2215) 1; 2020 O.J. (C 3156) 1; 2020 O.J. (C 4509) 1; 2020 O.J. (C 7127) 1; 2021 O.J. (C 564) 1; 2021 O.J. (C 8442) 1; Among others, these amendments allowed the Temporary Framework to cover: aid in form of tax deferral, suspension of social security contributions, and wage support to employees; recapitalization of failing businesses directly by taking an equity share (which could amount to nationalization in certain cases); support for uncovered fixed costs of companies facing a decline in turnover of at least 30% due to the pandemic, up to a maximum amount of €10 million per undertaking; conversion of repayable instruments such as loans and guarantees into direct grants.

<sup>31</sup>European Commission Statement/22/2980, State aid: Commission will phase out State aid COVID Temporary Framework (May 12, 2022).

<sup>32</sup>See 2020 O.J. (C 91), *supra* note 24. As for effective expenditures, in 2020 the 27 EU Member States spent, in nominal terms, €320.22 billion on State aid, corresponding to 2.43% of their 2020 GDP. Total expenditure for Covid-19 measures amounts to €227.97 billion (covering about 59% of the total spending). See *State aid Scoreboard 2021*, at 22 (Sept. 8, 2022), [https://competition-policy.ec.europa.eu/system/files/2022-09/state\\_aid\\_scoreboard\\_note\\_2021.pdf](https://competition-policy.ec.europa.eu/system/files/2022-09/state_aid_scoreboard_note_2021.pdf). In nominal terms, concerning the Covid-19 State aid measures, Germany is the Member State that has granted the most (EUR 63.66 billion), followed by Italy (EUR 29.64 billion), France (EUR 28.96 billion) and Poland (EUR 19.90 billion). These are quite exceptional outcomes if compared to the pre-Covid era. For example, the 2020 State Aid Scoreboard shows that Member States in 2019 spent just €134.6 billion. See *State aid Scoreboard 2020*, AT 17 (June, 14 2021) [https://competition-policy.ec.europa.eu/system/files/2021-06/state\\_aid\\_scoreboard\\_note\\_2020.pdf](https://competition-policy.ec.europa.eu/system/files/2021-06/state_aid_scoreboard_note_2020.pdf)

debt instruments, such as loans and guarantees, into other forms of aid, such as direct grants, until June 30, 2023.

The approach taken by the Commission has not been without criticism. According to some scholars, the decision to relax State aid rules would deepen the economic inequalities among Member States, favoring the wealthy ones.<sup>33</sup> Others emphasized that Member States benefitting more from the Temporary Framework were countries with lower public debt, which due to their different fiscal situations, were able to inject major amounts of money into their companies.<sup>34</sup> Such delicate issues lie outside the scope of this Article.<sup>35</sup> What is noteworthy here is that the approach based upon a very intrusive and aggressive use of state interventionist measures in the market seems to herald a more permanent feature of competition regulation in the EU.

As a preliminary observation, it is worthy to note that some initial—but widely unnoticed—modifications to EU state aid regulation were introduced prior to the pandemic. In 2014, the Commission introduced an instrument called Important Projects for Common European Interests (IPCEI), which exempts subsidies for research and development up to the first industrial deployment in transnational industrial alliances from state aid rules.<sup>36</sup> Until 2018 the Commission has activated that framework only for infrastructure projects, then in 2019 the Commission approved a \$3.2 billion project in battery value chains involving seven Member States.<sup>37</sup> Since then, a \$2.9 billion project along the entire battery value chains involving twelve member States,<sup>38</sup> and a £5.4 billion project in the hydrogen technology value chain involving fifteen Member States have been approved, respectively in 2021 and 2022.<sup>39</sup> This last project is also the first approved on the basis of the 2021 *State aid IPCEI Communication*, setting out the rules for the granting of subsidies to important projects of common European interest under Article 107(3)(b)TFUE.<sup>40</sup>

This same goal, aiming at adopting a more proactive stance when designing new regulations so as to be better equipped to promote the EU industrial policy's objectives, is apparent when taking into account further interventions by the Commission in the last couple of years. In 2021 and 2022, respectively, new guidelines have been adopted to facilitate the granting of regional aid which supports the ecological and digital transformation of disadvantaged areas,<sup>41</sup> and subsidies which pursue general energy and environmental goals.<sup>42</sup> As a result, there is today a corpus of legal instruments that adopts a proactive approach to enable EU industries to make the ecological and digital transition, and to promote European industrial autonomy in critical supply chains. Consequently, it seems perhaps correct to affirm that the outbreak of the Covid-19 global pandemic, and the following economic and industrial crisis, neither disrupted nor changed the EU Commission's activity and agenda concerning competition policy; indeed it simply accelerated

<sup>33</sup>Lena Hornkohl & Jens van 't Klooster, *With Exclusive Competence Comes Great Responsibility*, VERFASSUNGBLOG, April, 29 2020, <https://verfassungsblog.de/with-exclusive-competence-comes-great-responsibility/>.

<sup>34</sup>See, e.g., António Goucha Soares, *The EU-UK Trade and Cooperative Agreement. The Level Playing Field Issue*, 8 INTERDISCIPLINARY POL. STUD. 213 (2022).

<sup>35</sup>See Ferri, *supra* note 29, at 192–195.

<sup>36</sup>2014 O.J. (C 188) 4, at 5–7; see also Edoardo Traversa & Pierre M. Sabbadini, *Industrial policy and EU state aid rules*, in EU INDUSTRIAL POLICY IN THE MULTIPOLAR SCENARIO 45 (Jean-Christophe Defraigne, Edoardo Traversa, Jan Wouters & Dimitri Zurstrassen, eds. 2022).

<sup>37</sup>See European Commission Press Release IP/19/6705, State aid: Commission approves €3.2 billion public support by seven Member States for a pan-European research and innovation project in all segments of the battery value chain (Dec. 9, 2019).

<sup>38</sup>See European Commission Press Release IP/21/226, State aid: Commission approves €2.9 billion public support by twelve Member States for a second pan-European research and innovation project along the entire battery value chain (Jan. 26, 2021).

<sup>39</sup>See European Commission Press Release IP/22/4544, State Aid: Commission approves up to €5.4 billion of public support by fifteen Member States for an Important Project of Common European Interest in the hydrogen technology value chain (July 15, 2022).

<sup>40</sup>2021 O.J. (C 528) 10.

<sup>41</sup>See 2021 O.J. (C 153) 1.

<sup>42</sup>2022 O.J. (C 80) 1.

recent efforts to shift the focus of EU competition policy and State aid rules towards supporting industrial policy objectives rather than on lowering prices for consumers.<sup>43</sup>

Then, on March 23, 2022, amidst the crisis generated by the Russian armed aggression against Ukraine, the Commission adopted a Temporary Crisis Framework allowing Member States to use State aid rules more flexibly in order to remedy a serious disturbance in the economy caused by the Russian aggression and/or by the sanctions imposed, or by the retaliatory counter-measures taken in response.<sup>44</sup> In a similar fashion to the Covid-19 Temporary Framework, the Commission will consider all the national measures compatible with the Internal Market that meet the conditions set out in the Framework.<sup>45</sup> These include, in particular: aid in the form of guarantees and of subsidized loans to ensure that sufficient liquidity remains available to businesses, and to compensate companies for the additional costs incurred due to exceptionally high gas and electricity prices. The Commission amended the Crisis Framework twice. On July 20, 2022, by increasing the maximum amount of aid that companies are allowed to receive, as well as by including new types of State aid that can be deemed compatible with the internal market under Article 107 (3) (c) TFEU.<sup>46</sup> Further, on October 28, 2022 the Commission introduced additional flexibility for liquidity support to energy utilities for their trading activities, and allowed Member States to provide support more flexibly to particularly affected energy-intensive sectors subject to safeguards to avoid overcompensation.<sup>47</sup>

This course of action raises several concerns. Insofar as its specific objectives are concerned – to react to very exceptional circumstances threatening the international peace and security as well as the domestic security of the EU as a whole – perhaps the most correct way to intend the Temporary Crisis Framework is as a piece of “war legislation.” If maintained for too much time, the strong relaxation of the State Aid rules envisaged in that instrument may, however, finally result in very robust distortive effects on the market. Accordingly, they may impair the consistency of the overall structure of the EU competition legal framework, and further betray decades of EU’s efforts towards the “green transition.”

### C. The EU Acting Multilaterally: The EU’s 2021 Trade Policy Agenda and the Proposals on How to Modernize the WTO Rules on Subsidies and SOEs in the Market

The many and different causes of the WTO’s contemporary crisis, as well as the many and different proposals of reforming the WTO system to revitalize it, are matters that deserve a detail analysis and that will continue to preoccupy the minds of scholars, government officials, decision-makers and policy-makers in the years to come. With regard to the specific focus of this Article, the goal is narrower. As the latest communiqué of G7 Trade Ministers makes it clear, it is time, in the context of WTO reform, “for the start of negotiations to develop stronger international rules on market-distorting industrial subsidies and trade-distorting actions by state enterprises.”<sup>48</sup>

<sup>43</sup>Defraigne et al., *supra* note 8, at 10.

<sup>44</sup>2022 O.J. (C 131) 1.

<sup>45</sup>However, the Framework also presents significant differences with the Covid-19 Temporary Framework. First, it does not provide for recapitalization measures. Second, it does not require aid to be granted only to undertakings that were not facing difficulty before Russia’s military aggression of Ukraine.

<sup>46</sup>See 2022 O.J. (C 280) 1. These are: (i) aid for accelerating the rollout of renewable energy, storage, and renewable heat relevant for the repower EU Plan, and (ii) aid for the de-carbonization of industrial production processes. As these measures operate in the context of, and in support of, the Winter Preparedness Package proposal, the Commission seized the opportunity to redirect the objective and results of the Temporary Crisis Framework towards phasing out fossil fuels imported from Russia.

<sup>47</sup>2022 O.J. (C 7945) final.

<sup>48</sup>Elizabeth Truss, *G7 Trade Ministers’ Communiqué*, GOV.UK (May 28, 2021) <https://www.gov.uk/government/news/g7-trade-ministers-communicue>.



The necessity to pursue a modernization of WTO rules on subsidies and the actions of SOEs is also one of the key priorities highlighted by the 2021 EU trade agenda.<sup>49</sup> From the specific side of the EU, most of the concerns are based on absence of competition and state aid rules in third markets, which put EU companies at a competitive disadvantage with their non-EU competitors and limits their access in non-Member States.<sup>50</sup> In order to address current imbalances between WTO Member's market access commitments, the necessity thus arises, according to the Commission, to modernize rules on competitive neutrality: in particular, with regards to subsidies, which are artificially lowering process of goods, and SOEs, which are abusing their dominant position in a market.<sup>51</sup>

To better substantiate these ambitious goals, the EU Trade agenda is accompanied by a second lengthy document detailing some specific proposals. These include proposals concerning: (i) the restoration of a fully functioning WTO dispute settlement system with a reformed Appellate Body; (ii) the restoration of the effectiveness and credibility of the WTO as a forum for the negotiation of trade rules and further liberalization; (iii) the strengthening of the monitoring and deliberative function of the WTO as well as the role of the Director General and the Secretariat; and finally (iv) some proposals on how to better engage with the business and civil society.<sup>52</sup>

Quite evidently, these policy areas are strictly interconnected. An agreement on new binding rules on contested policies, including subsidies and SOEs, is unlikely to work without improving transparency of actors behavior and expectations. Insofar as transparency is concerned, period and effective monitoring plays a major role especially in times with virtually no outcomes in rule-making and a paralyzed dispute settlement system. The need then arises to reinforce the monitoring and deliberative functions of the WTO, primarily at the committee-level.<sup>53</sup> Finally, for existing WTO agreements to remain meaningful, and for the negotiation of new agreements, an effective dispute settlement system is critical.<sup>54</sup> Given the focus of the Article, our analyses will

<sup>49</sup>See European Commission Concept Note, WTO modernization: Introduction to future EU proposals (2018) [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf) (consisting of three sections on rulemaking, WTO notification work and transparency, and dispute settlement procedure. It discusses WTO reform systematically).

<sup>50</sup>See Luca Rubini, *Transcending territoriality: Expanding EU State aid control through consensus and coercion*, RSC 2022/33 Robert Schuman Centre for Advanced Studies Global Governance Programme-469, Working Paper 3–6 (2022).

<sup>51</sup>Unlike many bland WTO statements coming out of G7 or G20 declarations, the 2021 EU trade agenda does not hesitate to point fingers at various problems of the WTO. For instance, it points to problems with Special and Differential Treatment (SDT), including the need to develop a new approach that should “combine a more targeted focus on how to support integration into the trading system, along with greater differentiation between developing countries, based on identified needs.” Further, the Review highlights how market access commitments do not reflect the actual level of openness of many countries, thus failing to reflect the significant changes in weight of certain major trading powers (e.g. China). See *Commission Trade Policy Review*, *supra* note 1, at 6, 10; see also FREDRIK ERIXON, *THE GOOD, THE BAD AND THE UGLY: TAKING STOCK OF THE EUROPE'S NEW TRADE POLICY STRATEGY*, (Eur. Ctr. for Int'l Pol. Econ. 2021). The emphasis put by the EU on WTO reform is also rational and justifiable from a political perspective, as the Biden administration seems more open to rebuilding multilateralism and because there is now a new Director-General. See Schoenbaum, *supra* note 2; see also Garret Martin & Ville Sinkkonen, *Past as Prologue? The United States and European Strategic Autonomy in the Biden Era*, 27 EUR. FOREIGN AFF. 99 (2022). In the outcome document of the Geneva Ministerial Conference, held in June 2022, Member States registered the need “to work towards necessary reforms of the WTO . . . to improve all its functions.” To this end, the General Council and its subsidiary bodies “will conduct the work, review progress, and consider decisions, as appropriate, to be submitted to the next Ministerial Conference . . . .” World Trade Organization, M12 Outcome Document Adopted 17 June 2022, WTO Doc. WT/MIN(22)/24, par. 3 (June 22, 2022).

<sup>52</sup>*Annex to the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final 7–15, (Feb. 18, 2021).

<sup>53</sup>*Annex to the communication from the Commission*, *supra* note 52, at 13. See also Hoekman, Tu & Wolfe, *supra* note 4, at 11; Robert Wolfe, *Reforming WTO Conflict Management: Why and How to Improve the Use of 'Specific Trade Concerns'*, 23 J. OF INT'L ECON. L. 817, 817–839 (2020) (highlighting committees and councils in the WTO are, first and foremost, deliberative bodies for discussing emerging issues and addressing trade concerns without recourse to the dispute settlement system).

<sup>54</sup>As the EU Commission makes it clear: “The most urgent of WTO reforms is finding an agreed basis to restore a functioning dispute settlement system . . . In the absence of a functioning dispute settlement system, it is difficult to see what could

be limited to the EU proposals under point ii): that is, specific proposals on the establishment of new rules to avoid competitive distortions due to State intervention in the economy.

### *I. Proposals on the Establishment of New Rules on Industrial Subsidies*

Far from being intended as a critique on rehashing the role of the State as such,<sup>55</sup> the key challenge foreseen by the EU Commission in its proposal of new rules on industrial subsidies actually seems the necessity to counter those interventions that have negative spill-over effects, or that distort competition by favoring domestic firms, goods or services *vis-à-vis* foreign ones. Accordingly, the Commission outlines three options for actions in the field of industrial subsidies' rules. These are: (i) to formulate new rules on industrial subsidies to counter the negative effects of heavy subsidization on international trade, which can generate distortions of competition in both traditional sectors and new technologies; (ii) to arrive at significantly greater transparency and identify additional categories of prohibited ("red box") subsidies, as well as categories of subsidies presumed to be injurious ("amber box"); and (iii) to expand the category of the permitted ("green box") subsidies, by including those subsidies that support legitimate public goals while having minimal distortive impact on trade, such as, for instance, certain types of environmental and R&D subsidies, provided they are subject to full transparency and agreed disciplines.<sup>56</sup>

Some of these proposals echo the proposals that have been formulated by the Trilateral Cooperation Initiative in a Joint Statement released in January 2020.<sup>57</sup> According to a common concern that the current list of prohibited subsidies provided for in Article 3.1 of the ASCM is insufficient to tackle market and trade distorting subsidization existing in certain jurisdictions, the Trade Ministers of Japan, the US and EU agreed, first, that new types of unconditionally prohibited subsidies need to be added to the ASCM. These are subsidies that are unlimited guarantees, subsidies to "insolvent or ailing" enterprises that lack "a credible restructuring plan", subsidies to enterprises that cannot "obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity", and certain direct forgiveness of debt.

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be the motivation for countries to modernize and fill gaps in the rules." See *Annex to the communication from the Commission*, *supra* note 52, at 7. The EU proposal is based on restoring a fully functioning WTO dispute settlement system with a reformed Appellate Body. Such reform, according to the EU Commission, should maintain the negative consensus rule, the independence of the Appellate Body and "the central role of dispute settlement in providing security and predictability to the multilateral trading system." Further, it is emphasized that "adjudicators should exercise judicial economy and are not bound by 'precedent' but should take into account previous rulings to the extent they find them relevant in the dispute they have before them." The independence of panels and of the Appellate Body is highlighted as "essential so that cases are decided exclusively on their merits." It is also reiterated that mandatory timelines "should be strictly respected both at the Panel and Appellate Body stage of disputes—justice delayed is justice denied—and appropriate measures should be adopted in order to make this possible."

<sup>55</sup>*Id.* at 9. The Commission duly notes on that regard that "Public intervention may be needed to achieve legitimate goals, and the WTO should accommodate different degrees of public ownership in the economy."

<sup>56</sup>*Annex to the communication from the Commission*, *supra* note 52, at 9.

<sup>57</sup>JOINT STATEMENT OF THE TRILATERAL MEETING OF THE TRADE MINISTERS OF JAPAN, THE UNITED STATES AND THE EUROPEAN UNION (2020), [https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158567.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf) [hereinafter 2020 Joint Statement]. The Trilateral cooperation initiative was launched by US, EU, and Japan in December 2017 to address several "unfair market distorting and protectionist practices", including subsidies and SOEs. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, JOINT STATEMENT BY THE UNITED STATES, EUROPEAN UNION AND JAPAN AT MC11 (2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states>. According to the declaration, most significant challenges are the increased recourse to subsidies as part of value-chain production and trade (in goods and services), the heavy subsidization for competitive reasons by state-led economies, and the use of subsidies to support economic transformation towards sustainability. In May 2018, the Trilateral ministers endorsed a joint scoping paper defining the basis for the development of stronger rules on industrial subsidies contributing to excess production capacity in sectors such as semiconductors, steel, aluminum and others, and on state-owned enterprises (SOEs). See OFFICE OF THE U.S. TRADE REPRESENTATIVE, JOINT STATEMENT ON TRILATERAL MEETING OF THE TRADE MINISTERS OF THE UNITED STATES, JAPAN, AND THE EUROPEAN UNION (2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting> [hereinafter 2018 Joint Statement].

Further, the three Ministers also proposed some changes to the ASCM to simplify imposing countervailing duties on actionable subsidies, according to which the subsidizing Member must demonstrate that there are no serious negative trade or capacity effects and that there is effective transparency about the subsidy in question.<sup>58</sup>

Tough most of the concerns raised by the EU Commission about the necessity to modernize the WTO legal regulation of subsidies in response to recent major trends echoes concerns raised by the Trilateral Group, the solutions proposed do not match. As we will see later on, of particular relevance is the focus placed by the EU Commission in its recent Trade agenda on the inclusion of new rules on exceptions, i.e. instances in which subsidies that support legitimate public goals must be deemed to be lawful, provided they have minimal distortive impact on trade.<sup>59</sup>

## II. Proposals on the Establishment of New Rules on SOEs

Concerns about the potential for SOEs to distort competition are well-known, they have been examined by a consistent literature both from the legal and the economic point of view,<sup>60</sup> and they are also specifically addressed by other Articles in this Special Issues.<sup>61</sup> A key challenge in this regard will be not only whether the existing WTO legal framework is adequate enough to prevent the (mis)use of SOEs to circumvent or undermine existing regulations based upon the prohibition against discrimination and anti-competitive subsidization, but also whether SOEs should be disfavored by new WTO rules. In other words, the issue is also whether new international global (WTO) rules should constrain SOEs through new primary obligations.<sup>62</sup>

<sup>58</sup>Other changes proposed include that subsidies contributing to overcapacity should be explicitly challengeable via litigation at the WTO; and that a new strong incentive to notify subsidies properly should be added to Article 25 ASCM, rendering prohibited any non-notified subsidies that were counter-notified by another Member, unless the subsidizing Member provides the required information in writing within set timeframes. Finally, the three governments suggested that the ASCM should be amended to allow for domestic prices to be rejected in situations where the domestic market of the subsidizing Member is distorted and that a new price be constructed to establish the countervailing duty rate.

<sup>59</sup>See Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23 J. OF INT'L ECON. L. 371, 371–389 (2020) (discussing a detailed critic assessment of the Trilateral Initiative's proposals on subsidies).

<sup>60</sup>See Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options*, OECD CORPORATE GOVERNANCE WORKING PAPERS (2011); Przemyslaw Kowalski, Max Büge, Monika Sztajerowska & Matias Egeland, *State-Owned Enterprises: Trade Effects and Policy Implications*, 147 OECD TRADE POLICY PAPER (2013); OECD, STATE-OWNED ENTERPRISES AND GLOBAL COMPETITORS (2016); Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are we Moving in the Right Direction?*, 19 J. OF INT'L ECON. L. 657, 657–680 (2016); Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261–324 (2016); Petros C. Mavroidis & Merit E. Janow, *Free Markets, State Involvement and the WTO: Chinese State-Owned Enterprises in the Ring*, 16 WORLD TRADE REV. 571, 571–581 (2017); Robert Wolfe, *Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?*, 16 WORLD TRADE REV. 713, 713–732 (2017); YINGYING WU, *REFORMING WTO RULES ON STATE-OWNED ENTERPRISES* (2019); Leonardo Borlini, *When the Leviathan goes to the market: A critical evaluation of the rules governing state-owned enterprises in trade agreements*, 22 LEIDEN J. OF INT'L L. 313, 313–334 (2020); Mitsuo Matsushita & Chin Leng Lim, *Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules*, 19 WORLD TRADE REV. 402, 402–423 (2020); Luca Rubini & Tiffany Wang, *State-owned enterprises*, in HANDBOOK OF DEEP TRADE AGREEMENTS 463, 463–503 (Aaditya Mattoo, Nadia Rocha & Michele Ruta, eds. 2020); Bernard Hoekman & André Sapir, *State-Owned Enterprises and International Competition: Towards Plurilateral Agreement*, in REBOOTING MULTILATERAL TRADE COOPERATION: PERSPECTIVES FROM CHINA AND EUROPE 212 (Bernard Hoekman, Xinquan Tu & Dong Wang, eds. 2021); OECD, *MEASURING DISTORTIONS IN INTERNATIONAL MARKETS: BELOW-MARKET FINANCE* (2021); Robert Howse, *Official Business: International Trade Law and the Resurgence o (or Resilience) of the State as an Economic Actor*, 43 UNIV. OF PA. J. OF INT'L L. 821, 821–883 (2022); Ming Du, *The Status of Chinese State-owned Enterprises in International Investment Arbitration: Much Ado about Nothing?*, 20 CHINESE J. OF INT'L L. 785, 785–815 (2021) (raising issues in international investment law).

<sup>61</sup>See Du, *supra* note 3; Mitsuo Matsushita, *Interplay of Competition Law and Free Trade Agreements in Regulating State-Owned Enterprises*, in this special Issue.

<sup>62</sup>See MAVROIDIS & SAPIR, *supra* note 4; but see Howse, *Official Business*, *supra* note 60, at 860–881.

From the specific point of view of the EU, the 2021 Trade Agenda describes SOEs as “instruments through which, in a number of countries, the state decisively influences the economy, sometimes with market-distortive effects.”<sup>63</sup> Then it proposes that international SOE rules should “focus on the behavior of SOEs in their commercial activities, in line with the discipline already agreed upon in several free trade and investment agreements.”<sup>64</sup> Likewise, the 2018 Declaration of the Trilateral Initiative highlighted the importance “of securing a level playing field given the challenges posed by third parties developing State Owned Enterprises into national champions and setting them loose in global markets.”<sup>65</sup> The 2020 Trilateral Statement then focuses the proposal on SOEs on a new definition of the concept of “public body”, as the interpretation delivered by the WTO Appellate Body results in undermining the effectiveness of WTO subsidy rules.<sup>66</sup>

The EU Commission’s and the Trilateral Initiative’s proposals for new rules on SOEs, however, will not address the problem at all. They grasp the issue that the importance of SOEs in contemporary global trade environment is not yet matched with sufficient regulation at the global (WTO) level to capture any market-distorting behavior. But this is just part of a more complex problem. As the recent OECD Recommendation on Competitive Equality makes it clear, the idea of ensuring a level playing field should be approached in a more sophisticated way, by taking into account difference in treatment between both public and private enterprises with different ownership structures.<sup>67</sup> The notion is, above all, that distortions should not be introduced by differential treatment of different ownership structures, except when such differential treatment is justified by a public policy objective that should be transparent to all, proportionate and periodically reviewed.

### III. Critical Remarks on Proposals on the Establishment of New Rules on Subsidies and SOEs

An appraisal of the multilateral dimension of the EU to try to change (or renew) WTO rules on subsidies and SOEs must start from two key issues. First, as renowned scholars have aptly pointed out, before the elaboration of appropriate WTO multilateral rules on subsidies and SOEs may take place, additional fact-finding as well as analytical work is required to develop a common understanding of the effects of subsidies, including cross-border spillover effects, and their motivations, as well as on SOEs operations and their effect on market competition.<sup>68</sup> This means, first and foremost, reinforcing the requirements of notification and transparency “not as a disciplinary exercise but as an opportunity for information exchange and best governance practices.”<sup>69</sup> To this end, it is worthy to mention that the WTO in cooperation with the IMF and the OECD is actually undertaking studies on different types of subsidies ahead of rulemaking.<sup>70</sup> The European Commission’s proposed new regulation on foreign subsidies, which will be discussed in Section E, could potentially also represent an interesting laboratory for developing a better knowledge base on subsidies.

Further, we should not forget that the WTO is a consensus-based system, and an agreement among all its 164 members is necessary before reforming existing subsidy and SOEs regulations.

<sup>63</sup>Annex to the communication from the Commission, *supra* note 52, at 9.

<sup>64</sup>*Id.*, at 9–10.

<sup>65</sup>2018 Joint Statement, *supra* note 57.

<sup>66</sup>2020 Joint Statement, *supra* note 57.

<sup>67</sup>OECD, RECOMMENDATION OF THE COUNCIL ON COMPETITIVE NEUTRALITY, DOC. OECD/LEGAL/0462 (2021) (“[t]he objective of the Recommendation is to ensure a level playing field both between state-owned and privately-owned enterprises, and between different privately-owned enterprises.”).

<sup>68</sup>Hoekman & Nelson *supra* note 4, at 22; Hoekman & Sapir, *supra* note 60, at 220–221; Robert Howse, *Official Business*, *supra* note 60, at 882–883.

<sup>69</sup>Robert Howse, *Official Business*, *supra* note 60, at 882.

<sup>70</sup>See OCED, SUBSIDIES, TRADE, AND INTERNATIONAL COOPERATION (2022) <https://www.oecd-ilibrary.org/docserver/a4f01ddb-en.pdf?expires=1666641168&id=id&accname=guest&checksum=2C398F32F2508B8A41B15D0DC50691FB>.

Therefore, both the EU's proposals and the Trilateral group's initiatives need widespread support before being submitted to the WTO. In the current environment, it is therefore quite easy to see why the chances of a robust reform of industrial subsidy rules and SOEs at the global level are very low. This is especially if these proposals are openly tilted against well-defined countries. As far as the EU proposals put forward in the 2021 Commission's Communication on "An Open, Sustainable and Assertive Trade Policy" are concerned, they have a clear target: China and its state-led economic model. This is not the place to trace the development of the Chinese economy as a mix between competitive market forces and a highly developmentalist state,<sup>71</sup> nor to talk about the recent EU's reassessment of China as a "systemic rival."<sup>72</sup>

Suffice is to remember that in a press conference on its WTO Trade Policy Review, in 2021, China listed three conditions in order to be available to starting negotiations on subsidies within the framework of WTO reform. They are: That agricultural subsidies must be discussed at the same time as industrial subsidies to ensure fair competition in both important areas; that countervailing and anti-dumping regulations should be discussed to solve the alleged current abuse of trade relief measures; and finally, that the issue of restoring non-litigable subsidies be discussed, to leave policy space for members to cope with the epidemic and climate change.<sup>73</sup> Unless and until these issues are resolved, it is difficult to see how an ideal deal on subsidies and SOEs at the WTO level can be reached. Thus considered, it is perhaps no accident indeed that the issues of industrial subsidies (and subsidies more broadly)<sup>74</sup> and of SOEs have been left totally unaddressed during the 12th Ministerial Conference (MC12) that was held in Geneva from June 12–17, 2022.

#### D. The EU Acting Bilaterally: The Negotiation and Conclusion of Trade Agreements Incorporating Subsidy and SOEs Disciplines

With the WTO being unable over the years to reach any significant reform of its ASCM Agreement and its rules concerning SOEs, many countries have increasingly started to negotiate trade agreements outside the WTO framework as well as to view these agreements as potential solutions to international trade key issues.<sup>75</sup> This point has been made very clear by the EU Commission in its 2006 Communication "Global Europe: Competing in the World — A Contribution to the EU's Growth and Jobs Strategy," where the Commission declared that

<sup>71</sup>See Du, *supra* note 3; Ming Du, *China State Capitalism and World Trade Law*, 63 INT'L AND COMPAR. L. Q. 409, 409–448 (2014); Wu, *The "China, Inc. Challenge"*, *supra* note 60; JEAN-FRANÇOIS DUFOUR, *CHINA CORP.*2025 (2019); ARTHUR R. KROEBER, *CHINA'S ECONOMY* (2 ed., 2020).

<sup>72</sup>*EU-China – A strategic outlook*, JOIN (2019) 5 final (Mar. 12, 2019) (discussing where the EU stated that: "China is simultaneously, in different policy areas, a cooperation partner with whom the EU has closely aligned objectives, a negotiating partner with whom the EU needs to find a balance of interests, an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance").

<sup>73</sup>See *China Is Open to Talks on Industrial Subsidies, Xi Says*, BLOOMBERG (November 4, 2021), <https://www.bloomberg.com/news/articles/2021-11-04/xi-says-china-open-to-talks-on-industrial-subsidies-state-firms>; see also *China's Proposal on WTO Reform in WTO document*, WTO Doc. WT/GC/W/773 (2019).

<sup>74</sup>MC12 secured, however, the conclusion of a new multilateral agreement on fisheries subsidies, the second new agreement since the WTO began operations in 1995. See WTO, Draft Ministerial Decision of 17 June 2022 WTO Doc. WT/MIN(22)/W/22 (2022). The agreement is important, first and foremost, because it addresses a global environmental concern and because repeatedly missed deadlines to conclude an agreement generated a very high skepticism about the credibility of the WTO as a negotiating forum. An agreement was reached, however, only those matters on which there was consensus: banning subsidies for illegal, unreported and unregulated fishing and overfished stocks. On the other end, Members agreed to continue negotiating on other fishing subsidies disciplines (subsidies contributing to overcapacity and overfishing), and a sunset clause (Article 12) has been included, according to which the agreement will lapse unless comprehensive rules are adopted within four years of its entry into force.

<sup>75</sup>See Aadiya Mattoo, Nadia Rocha & Michele Ruta, *Overview: the evolution of deep trade agreements*, in *HANDBOOK OF DEEP TRADE AGREEMENTS*, 1, 1–43 (Aadiya Mattoo, Nadia Rocha & Michele Ruta, eds. 2020) (observing, *inter alia*, that the number of PTAs increased from 50 in the early 1990s to roughly 300 in 2019; and that all WTO members are currently party to one, and often several, PTAs).



bilateral PTAs are “a necessary tool” within the more ambitious goal to take the EU “further and faster in promoting openness and integration, by tackling issues which are not ready for multi-lateral discussion and by preparing the ground for the next level of multilateral liberalization.”<sup>76</sup>

Modern trade agreements have been concluded by the EU, or are under negotiations, with industrialized countries (South Korea, Canada, Japan, Australia, New Zealand), emerging market economies (Singapore, Mercosur, Mexico, Chile), and developing countries (Vietnam, Indonesia, India).<sup>77</sup> It goes without saying that partner countries vary greatly regarding their level of development, the convergence of competition policies, and the use of subsidies and SOEs. From this angle, quite different approaches are required for each partner country: in some cases the main goal of negotiation can be trade promotion or the economic development of the partner country, while in other cases the EU aims to push for the convergence in competition policy, including subsidy control and actions of SOEs. It would then be a grave error to oversimplify any of the final outcomes. As for their legal frameworks, these agreements contain, on the one end, rules that reflect (or are, at least, still based on the relevant) WTO law. On the other end, States agreed on provisions that go further the WTO law and lead to deeper market integration (WTO+ provisions).<sup>78</sup> Accordingly, new international trade law rules are emerging that exist in parallel to the WTO legal framework.

For the purpose of this section, the focus is on the new generation of PTAs<sup>79</sup> that are irrelevant to accession and that provide enhanced subsidy and SOE disciplines.<sup>80</sup> Before starting the analysis, a very brief introduction is necessary to better understand the true role of EU bilateral trade agreements as instrumentalities of the EU Common Commercial Policy (CCP) and its trade agenda.

<sup>76</sup>*Global Europe: Competing in the World – A Contribution to the EU’s Growth and Jobs Strategy*, COM (2006) 567 final, at 8 (Oct. 4, 2006).

<sup>77</sup>See EU COMMISSION, OVERVIEW OF FTA AND OTHER TRADE NEGOTIATIONS (2022), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a7aab8e0-085d-4e36-826f-cbe8e913cf13/details> (showcasing an overview of ongoing bilateral and regional negotiations); 2021 O.J. (L 149) 10. In this FTA, the EU has recently concluded a trade and cooperation agreement with the United Kingdom which is aimed at regulating their common trade relations after the UK’s withdrawal from the EU and the Internal single market. The Agreement contains a specific Title (number IX) on “Level Playing Field for Open and Fair Competition and Sustainable Development”, whose rationale is defined in Article 355. Articles 363–375 provide rules on subsidy control, according to which the right is recognized of the parties to maintain an autonomous system on State aid, and to implement it in accordance with the procedures provided for in the respective legal system. The TCA also provides that the control of subsidies must be made by an independent authority or body. Overall, the principles set out in the Agreement create a system of subsidy control which is very closely aligned with Article 107. The outcome of the negotiations has been surely made easier because of the long-standing membership of the UK in the Single market and the danger of fierce competition in the future.

<sup>78</sup>See WTO, WORLD TRADE REPORT 2011: THE WTO AND PREFERENTIAL TRADE AGREEMENTS: FROM CO-EXISTENCE TO COHERENCE 11 (2011) (discussing the use of the expression “WTO+”).

<sup>79</sup>According to academic literature, EU FTAs can be grouped under three broad categories: (i) agreements with candidate and potential candidate countries; (ii) agreements with former Soviet Union States and Southern Mediterranean countries that are neither candidates nor potential candidates; or (iii) agreements with strategic partners around the globe. See Leonardo Borlini & Claudio Dordi, *Deepening International Systems of Subsidy Control: the (Different) Legal Regimes of Subsidies in the EY Bilateral preferential Trade Agreements*, 23 COLUM. J. OF EUR. L. 551, 551–606 (2017). Such categorization partly mirrors the approach by the EU. The EU Commission classifies EU FTAs in four categories: (i) “First generation” trade agreements, most of them concluded before 2006, which tend to focus on tariff liberalization, (ii) “Deep and Comprehensive Free Trade Areas” (DCFTAs), which aim to deepen economic relations between the respective neighboring countries and the EU and focus on approximating their legislation to EU legislation, notably in trade-related areas, (iii) Economic Partnership Agreements (EPAs) with African, Caribbean and Pacific (ACP) States and regions, which are asymmetric by nature and have an explicit development objective, and (iv) “New generation agreements” (such as those with Singapore, Canada, Japan, Australia, New Zealand, Vietnam), which aim to develop stronger rules-based and values-based trade regimes with the trading partner countries concerned and include dedicated provisions on trade and sustainable development.

See 2019 Report on Implementation of EU Free Trade Agreements 1 January 2018 - 31 December 2018, at 8 (2019), [https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc\\_158387.pdf](https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158387.pdf).

<sup>80</sup>2014 O.J. (L 161) 3, at art. 267 (discussing the association agreements the regulation of subsidies is along the lines of Article 107 TFEU and tends to converge towards the EU *aquis communautaire* as a precondition for closer ties with and possibly later accession to the EU).

### I. PTAs as Instrumentalities of the CCP

The CCP has “a special place”<sup>81</sup> in the exclusive competences of the EU. First, EU external relations had their “very constitutional origin”<sup>82</sup> in the EU Treaty (then EEC Treaty) provisions on trade policy.<sup>83</sup> Further, it is precisely because of that competence that the EU was able to establish itself onto the international scene as one of the key players in the global trading system,<sup>84</sup> as well as proved itself able to participate in defining the rules of the game for global trade and economy.<sup>85</sup> To date, the EU is applying 46 trade agreements with 78 different partners and, compared to China (the number one trading partner for 66 countries) and the US (the number one partner to 31 countries), is the most important trading partner for 74 countries around the world.<sup>86</sup> Most importantly, trade agreements are also used to achieve a range of different (non-trade) objectives: from EU participation in the economic development of the partners, to foreign policy, environmental protection, the protection/promotion of human rights, and legal/regulatory convergence in the case of association agreements. As one prominent scholar has observed, in such cases “the non-trade objective is ulterior and the trade objective is manifest.”<sup>87</sup> Trade policy, in particular trade agreements, is therefore not only part of the EU’s external action agenda but also one (if not, *the*) “larger EU foreign policy toolbox.”<sup>88</sup>

As a matter of policy goals and trade strategies, the 2021 EU Trade Policy Agenda does not make significant changes to the previous EU trade agenda published by the Commission in 2015;<sup>89</sup> nor does it revolutionize the EU trade strategy as a whole. As for the bilateral agenda, however, some relevant adjustments can be easily identified. Whilst the 2015 EU Trade Agenda outlined a very detailed and ambitious list of bilateral trade partnerships that the EU was keen to conclude (including with the US and China),<sup>90</sup> the 2021 Trade Agenda is much more renitent on this topic. On the one side, it does not provide any list of new bilateral trade agreements to pursue; on the other, it does however explain, albeit in quite a general way, how the EU can strengthen and update the existing (and very broad) network of bilateral agreements. To achieve this objective, the 2021 Trade Agenda put particular emphasis on the need to increasingly focus on the full and effective implementation of these agreements.<sup>91</sup>

<sup>81</sup>Marise Cremona, *External Relations of the European Union: The Constitutional Framework for International Action, in THE EVOLUTION OF EU LAW 444* (Paul Craig & Gráinne de Búrca, eds. 2021).

<sup>82</sup>PIET EECKHOUT, *EU EXTERNAL RELATIONS LAW 67* (2011).

<sup>83</sup>Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]. As it is well known, the European Treaties do not explicitly refer to the concept of sovereignty but there are certain areas where, as a corollary of the full transfer of powers from Member States to the EU, the EU “is (quasi-)sovereign.” See Christina Eckes & Ramses A. Wessel, *An International Perspective, in OXFORD PRINCIPLES OF EUROPEAN UNION LAW 95* (Robert Schütze & Takis Tridimas, eds. 2018); Theodore Konstadinides, *The Competences of the Union, in OXFORD PRINCIPLES OF EUROPEAN UNION LAW 191, 191–220* (Robert Schütze & Takis Tridimas, eds. 2018).

<sup>84</sup>CJEU, Opinion 2/15 EU:C:2017:376 (May 16, 2017), at 34–35.

<sup>85</sup>The CCP has been at the heart of the European integration process since its entry into force in the EEC Treaty in 1958, but it was, especially in the 1970s, and the 1980s that the EU Court of Justice, sided by the Commission, ruled that the commercial policy was exclusive. See Opinion 1/75, *OECD Understanding on a Local Cost Standard*, EU:C:1975:145 (Nov. 11, 1975); EECKHOUT, *supra* note 82, 11–69 (discussing the historical evolution of the CCP); see also Christine Kaddous, *The Transformation of the EU Common Commercial Policy, in THE EUROPEAN UNION’S EXTERNAL ACTION IN TIMES OF CRISIS 429, 429–452* (Piet Eeckhout & Manuel López-Escudero, eds. 2016) (discussing the most recent evolution of the CCP since the entry into force of the Lisbon Treaty).

<sup>86</sup>See EU COMMISSION, *An Open, Sustainable and Assertive Trade Policy: Key Facts and Figures* [https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159431.pdf](https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159431.pdf).

<sup>87</sup>Cremona, *supra* note 81, at 443.

<sup>88</sup>L. Johan Eliasson & Patricia Garcia-Duran, *The Saga Continues: contestation of EU trade policy*, 6 *GLOB. AFF.* 433 (2020).

<sup>89</sup>*Trade for all – Towards a more responsible trade and investment policy*, COM(2015) 497 final (October 14, 2015).

<sup>90</sup>*Id.* at 30–34.

<sup>91</sup>See *Commission Trade Policy Review*, *supra* note 1, 17–21.

## II. Subsidies Provisions in Recent EU PTAs

Historically, the EU has not been, unlike the US, a driver of international subsidy regulation.<sup>92</sup> This is for a number of reasons, not least of which is that the EU has traditionally been strongly protectionist in its agricultural policy, which still includes a high level of subsidies. Lately, however, the regulation of subsidies (and SOEs) became a relevant aspect of the EU's trade policy, and this is not only at the multilateral level (i.e. pushing for a robust reforming agenda of the relevant WTO rules), but also at the bilateral level. Through the network of its newly concluded (or under negotiation) bilateral trade agreements (and, in particular PTAs), the EU is indeed looking at a closer convergence of the current subsidy rules to the model of EU state aid law, as this would make an important contribution for the creation of a level playing field in the context of its trade relationships with partner countries. The subsidy clauses in recently concluded agreements seem to contain five recurring elements.

First, the definition of subsidy/State aids covers not only goods but also services. A typical formulation is in Article 10.5 of the EU-Vietnam Agreement, that states: "A 'subsidy' means a measure which fulfills the conditions set out in Article 1.1 of the SCM Agreement irrespective of whether it is granted to an enterprise manufacturing goods or supplying services."<sup>93</sup> As no parallel rule on subsidies yet exists at WTO level for trade in services, this rule can be referred to as WTO+. To the extent that such definition closes a relevant gap in the WTO legal framework, the inclusion of services within the definition of subsidies seems an effective tool to appropriately address the concerns, raised by the Commission in its 2021 EU Trade Agenda, to avoid state intervention possibly having negative spill-over effects and distorting competition by favoring domestic services *vis-à-vis* foreign ones.<sup>94</sup> Another reason to positively assess, from the side of the EU, such negotiation outcome originates from the increased difficulty in distinguishing between goods and services in the digital environment.<sup>95</sup>

Another remarkable example of WTO+ provision is given by recent EU PTAs having significantly expanded the category of prohibited subsidies when they adversely affect international trade. Starting from the EU-Korea FTA, which had provisionally applied since July 2011 before it was formally ratified in December 2015, many recent PTAs include two additional categories of prohibited subsidies. These are: i) subsidies whereby a government guarantees debts or liabilities of certain enterprises without any limitation as to the amount of those debts and liabilities or the duration of such a guarantee, and ii) subsidies for restructuring an ailing or insolvent enterprise without the enterprise having prepared a credible restructuring plan.<sup>96</sup> The latter provision, in particular, transposes the centerpiece of the EU compatibility analysis under the rescue and restructuring guidelines<sup>97</sup> into the network of recent PTAs, ensuring that ailing companies are not artificially kept alive through public subsidies alone. This provision also constitutes an important mean to prevent EU-members from re-directing aid forbidden within the EU into partner countries, to support the commercial presence of national companies there.

<sup>92</sup>See Philipp Reinhold, *European Trade Policy and the Regulation of Subsidies: What Can We Expect from the EU-Australia FTA?*, in AUSTRALIA-EUROPEAN UNION FREE TRADE AGREEMENT 203 (Marc Bungenberg & Andrew Mitchell, eds. 2022).

<sup>93</sup>2020 O.J. (L 186) 3, at art. 10.5(1) [hereinafter *Viet. FTA*]; see also 2019 O.J. (L 294) 3, at art. 11.5(1) [hereinafter *Sing. FTA*]; *EU-Japan Economic Partnership Agreement*, at art. 12.2(b) COM (2018) 192 final (Apr. 18, 2018) [hereinafter *Japan EPA*]; *Modernisation of the Trade part of the EU-Mexico Global Agreement*, at art. X.7 (Apr. 21, 2018) [hereinafter *Mex. GA*]; *EU-New Zealand Free Trade Agreement* art. X.2 (June 30, 2022) [hereinafter *NZ FTA*]; but see 2017 O.J. (L 11) 23, at art. 7.1 [hereinafter *CETA*] (providing an exception, limiting the definition of subsidies to goods).

<sup>94</sup>EU Commission, *Annex to the communication*, *supra* note 52, at 9.

<sup>95</sup>Pedro Guilherme Lindenberg Schoueri & Jeffrey Owens, in *Pursuit of Fair Tax Competition: The Linkage Between PTA, WTO Subsidies and EU State Aid Rules*, 48 INTERTAX 585, 585 (2020).

<sup>96</sup>See, e.g., 2011 O.J. (L 127), at art. 11.11 [hereinafter *S. Kor. FTA*]; *Sing. FTA*, *supra* note 93, at art. 11.7(2); *Japan EPA*, *supra* note 93, at art. 12.7); *Viet. FTA*, *supra* note 93, at art. 10.9; *Mex. GA*, *supra* note 93, at art. X.11; *NZ FTA*, *supra* note 93, at art. X.7.

<sup>97</sup>2014 O.J. (C 249) 1, at 3.

A further significant innovation of recent PTAs concerns provisions introducing legitimate reasons for granting subsidies. From a trade perspective, the analysis traditionally concentrates on documenting the negative impact of subsidies as measures distorting the proper functioning of markets and undermining the benefits of trade liberalization. Under that perspective, “subsidies can and are just as effective a ‘barrier’ to trade as tariffs.”<sup>98</sup> These analyses thereby give short shrift to the real issue, which is how the effect on trade should be weighed against (legitimate) objectives and (positive) effects of subsidies. In other words, subsidies are “ambivalent” practices.<sup>99</sup> They may distort market functioning, at least as much as they can correct it, by producing positive effects and pursuing other legitimate non-economic, social, and distributive objectives.<sup>100</sup> Such normative rationale of subsidy control is very clearly articulated in recent EU PTAs. In this context, we can find different approaches. Some agreements reproduce the exceptions in Article XX GATT and Article XIV GATS, which reflected the same normative rationale though in a less manifest posture.<sup>101</sup> The major part of these agreements, however, give express recognition of public policy objectives that can be pursued legitimately through subsidies. At first, some of these agreements provide a very general scope justification for subsidies granted to enterprises entrusted by the government with the provision of services to the general public for public policy objectives.<sup>102</sup> As far as they are transparent and not go beyond their targeted public policy objectives, these subsidies are therefore outside the scope of application of the relevant legal frameworks on subsidy control. Both the agreements that contain the general exception as well as the agreements lacking it, further acknowledge that other subsidies, which respect specific legitimate policy objectives, should be tolerated. These include subsidies for audio-visual services,<sup>103</sup> cultural industries,<sup>104</sup> the promotion of the economic development of areas where the standard of living is abnormally low or where there is serious underemployment,<sup>105</sup> exceptional occurrences such as natural disasters<sup>106</sup> or a national or global health emergency,<sup>107</sup> and the promotion of cultural and heritage conservation.<sup>108</sup> In some cases, these exemptions are very similar to those in EU state aid law, and in one specific case, that is the EU–Singapore FTA, there is an annex that reproduces *verbatim* almost all the exemptions under EU state aid law.<sup>109</sup>

A final order of examination concerns the procedural aspects of PTAs agreements, namely enforcement and transparency. Almost all recent PTAs include a provision broadly related to its enforcement, designed as an obligation to engage in separate consultations and/or constant reviews. Consultations will allow Parties to raise their concerns in case a subsidy is likely to negatively affect trade, thereby excluding the subsidies clause from the state–state dispute settlement mechanism.<sup>110</sup> At the same time, some agreements also contain review clauses that provide for

<sup>98</sup>Brian Alexandre Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade’s Destiny)*, in FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE. VOL. II: THE LEGAL ANALYSIS 231, 235 (Jadish Baghwati & Robert E. Hudec, eds. 1997).

<sup>99</sup>Leonardo Borlini & Claudio Dordi, *supra* note 79, at 580.

<sup>100</sup>Warren F. Schwartz & Eugen W Jr. Harper, *The Regulation of Subsidies Affecting International Trade*, 7 MICH. L. REV. 883 (1972).

<sup>101</sup>*Japan EPA*, *supra* note 93, at art. 12.9.

<sup>102</sup>*Japan EPA*, *supra* note 93, at art. 12.9; *S. Kor. FTA*, *supra* note 96, at art. 11.11; *Viet. FTA*, *supra* note 93, at art.10.1; *Mex. GA*, *supra* note 93, at art. X.7(4); *Sing. FTA*, *supra* note 93, at art. 11.7(4).

<sup>103</sup>*CETA*, *supra* note 93, at art. 7.7; *S. Kor. FTA*, *supra* note 96, at art. 11.11; *Japan EPA*, *supra* note 93, at art. 12.3(7); *NZ FTA*, *supra* note 93, at art. X.2(6); *Mex. GA*, *supra* note 93, at art. X.7(6).

<sup>104</sup>*CETA*, *supra* note 93, at art. 7.7.

<sup>105</sup>*Viet. FTA*, *supra* note 93, at art. 10.4(2).

<sup>106</sup>*Japan EPA*, *supra* note 93, at art. 12.3(3); *Viet. FTA*, *supra* note 93, at art.10.4(2); *NZ FTA*, *supra* note 93, at art. X.2(7).

<sup>107</sup>*NZ FTA*, *supra* note 93, at art. X.2(7).

<sup>108</sup>*Viet. FTA*, *supra* note 93, at art. 10.4(2).

<sup>109</sup>*Sing. FTA*, *supra* note 93, at annex 11-A.

<sup>110</sup>*CETA*, *supra* note 93, at art. 7.3; *Viet. FTA*, *supra* note 93, at art.10.8; *Sing. FTA*, *supra* note 93, at art. 11.13; *Japan EPA*, *supra* note 93, at art. 12.6; *Mex. GA*, *supra* note 93, at art. X.4; *NZ FTA*, *supra* note 93, at art. X.6.

future adjustments after a fixed period of time.<sup>111</sup> Further, these review clauses are often linked to a political agreement between the EU and its trading partner in order to ensure that further development of subsidy rules will occur in light of corresponding norms at the multilateral (WTO) level.<sup>112</sup> These provisions are strictly linked to provisions aimed at improving transparency on subsidies in the target country. Recent PTAs indeed contain a clause making it mandatory for partner countries to notify certain information (i.e. legal basis, form, amount or budget and, where possible, the name of the recipient) with regard to any subsidy granted or maintained within their respective territories.<sup>113</sup> The presence of reinforced transparency clauses is relevant as these provisions attempt to tackle one of the main weaknesses of the WTO system, that is affected, as we have already pointed out, by a chronic incompleteness and delays of subsidy notifications from several members.

### III. SOEs Provisions in EU PTAs

With regard to the provisions on SOEs, the new generation of EU PTAs provides rules to address some of the issues unsolved at the WTO level, thereby trying to ensure a level playing field. Almost all agreements require SOEs to act “in accordance with commercial considerations” and non-discrimination.<sup>114</sup> This means that the buying and selling decisions of the SOEs must be commercially motivated by price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale, according to market economy principles in a way that a privately owned enterprise would act. Also, SOEs should not use their position or the entrusted rights to engage, either directly or indirectly (e.g., through their dealings with parents, subsidiaries, or other undertakings with common ownership) in anti-competitive practices that adversely affect investments, trade in goods or services of the other parties, in a market where such undertakings have no special or exclusive rights.<sup>115</sup> The rules concern only the commercial activities of the SOEs and most agreements also provide for general exemptions and specific limitations, with varying intensity.

It is worth mentioning that some PTAs widen the traditional legal definition of SOEs, adding that a SOE is also an enterprise in which the government has the power to legally direct its actions or otherwise exercises an equivalent degree of control in accordance with its laws and regulations.<sup>116</sup> Some agreements limit their application to the largest SOEs,<sup>117</sup> or to SOEs for which a Party has taken measures on a temporary basis in response to a national or global economic emergency,<sup>118</sup> and/or exclude public service obligations, that is those obligations that are not required to follow commercial considerations.<sup>119</sup>

A few agreements also call on the Parties to respect and make the best use of relevant international standards including, *inter alia*, the OECD Guidelines on Corporate Governance

<sup>111</sup>Viet. FTA, *supra* note 93, at art 10.10; EU Commission, *Sing. FTA*, *supra* note 93, at art.11.10; S. Kor. FTA, *supra* note 96, at art. 11.14.

<sup>112</sup>Viet. FTA, *supra* note 93, at art. 10.10; S. Kor. FTA, *supra* note 96, at art 11.15(2).

<sup>113</sup>S. Kor. FTA, *supra* note 96, at art 11.12; CETA, *supra* note 93, at art. 7.2; Japan EPA, *supra* note 93, at art. 12.5; Viet. FTA, *supra* note 93, at art. 10.7; Sing. FTA, *supra* note 93, at art. 11.9; Mex. GA, *supra* note 93, at art. X.9; NZ FTA, *supra* note 93, at art. X.5.

<sup>114</sup>Sing. FTA, *supra* note 93, at art. 11.3(4); CETA, *supra* note 93, at art. 18.4, 18.5; Mex. GA, *supra* note 93, at art. 6; Japan EPA, *supra* note 93, at art. 13.5; Viet. FTA, *supra* note 93, at art. 11.4; NZ FTA, *supra* note 93, at art. X.5.

<sup>115</sup>Sing. FTA, *supra* note 93, at art. 11.3(3).

<sup>116</sup>NZ FTA, *supra* note 93, at art. X.1(iv). See also Matsushita, *supra* note 61.

<sup>117</sup>Japan EPA, *supra* note 93, at art. 13.2(5); Viet. FTA, *supra* note 93, at art. 11.2(4); NZ FTA, *supra* note 93, at art. X.2(3).

<sup>118</sup>Japan EPA, *supra* note 93, at art. 13.1(h); Viet. FTA, *supra* note 93, at art. 11.2(3).

<sup>119</sup>Mex. GA, *supra* note 93, at art. 3; CETA, *supra* note 93, at art. 18.2(2); Viet. FTA, *supra* note 93, at art. 11.2(7); Japan EPA, *supra* note 93, at art. 13.2, at 3–4; NZ FTA, *supra* note 93, at art. X.2, at 4–5. Art. 13(8) of the EU-Japan EPA extends the scope of public policy interventions that parties can implement through SOEs, incorporating the general exceptions established by Art. XX GATT 1994 and Art. XIV GATS *mutatis mutandis*.



of State-Owned Enterprises<sup>120</sup> Finally, in case of potential problems, rules on transparency allow both sides to seek further information on particular enterprises and their activities on a case-by-case basis.<sup>121</sup>

#### IV. Critical Remarks on Subsidies and SOEs Provisions in Recent EU PTAs

Whether recent PTAs represent any advancement towards fulfilling the specific EU trade policy agenda goals concerning the role of the State in the economy is a very complex undertaking. On the one side, we can notice some points of strength. Most importantly, the analysis shows that recent EU agreements contain significant and persuasive borrowings from EU State aid law. Perhaps, the most remarkable is the expansion of the material scope of these agreements to include services within the definition of subsidies. By doing so, EU PTAs address one of the more pressing issues of the WTO SCM Agreement. The inclusion of a list of *good* subsidies (most of which reproduce the very same language of EU law)<sup>122</sup> is also a far-reaching result, especially in the wake of the Covid-19 global pandemic and its economic and social aftermaths. The fact that “European” principles have been included in agreements that go beyond the circle of those countries (like Japan, Vietnam, New Zealand, Singapore, South Korea, and Mexico) that can be defined as European is also a relevant data. The significant expansion of the geographical reach of recent PTAs, if compared to the experience of the first 12/13 years of the 2000s, should not be underestimated.<sup>123</sup>

There are some positive results also from an international trade law perspective. The inclusion of WTO+ rules on justifications represent, for instance, one of the main steps forward compared to the current multilateral (WTO) system, which is generally based on the conceptual assumption that subsidies must be stopped, irrespective of their overall welfare implications. A closer look at illustrative lists of acceptable public policy objectives included in EU PTAs also reveals a certain level of flexibility, in the sense that the EU seems to duly take into account the need to cover the needs of developing countries, like Vietnam or Mexico.<sup>124</sup> This would lead to a more nuanced and policy-oriented approach than the one incorporated in the WTO SCM Agreement. Still, the existence of transparency rules in all recent EU PTAs may prove a relevant improvement, by ensuring at least a certain level of political accountability and dialogue, even with respect to service subsidies.<sup>125</sup>

Against this backdrop, there are also potential drawbacks. With regard to the regulation of SOEs, for example, while it is uncontroversial that the regulatory approach to SOEs envisaged in EU PTAs is much more effective compared to that of some treaties that provide no additional discipline for SOEs, such as in the recent practice of agreements negotiated by China or other countries with similar market-based economies,<sup>126</sup> more aggressive and ambitious approaches still exist. This is the case, for example, of the regulation shaped by the CPTPP and the USMCA, which aims to prevent adverse effects or injury to the interest of other parties as a result of advantages that SOEs obtain because of their proximity to the government. Another distinct feature of these

<sup>120</sup>Japan EPA, *supra* note 93, at art. 13.6; NZ FTA, *supra* note 93, at art. X.6 (2019).

<sup>121</sup>Japan EPA, *supra* note 93, at art. 13.7; Viet. FTA, *supra* note 93, at art. 11.6; NZ FTA, *supra* note 93, at art. X.7; Mex. GA, *supra* note 93, at art. 8.

<sup>122</sup>Rubini, *supra* note 50, at 8.

<sup>123</sup>*Id.*

<sup>124</sup>See Viet. FTA, *supra* note 93, at annex 11A; see Mex. GA, *supra* note 93, at Annex XX (2018) (providing for specific lists of exceptions tailored on the needs of the countries).

<sup>125</sup>Lindenberg Schoueri & Owens, *supra* note 95, at 594.

<sup>126</sup>Leonardo Borlini, *When the Leviathan goes to the market: A critical evaluation of the rules governing state-owned enterprises in trade agreements*, 22 LEIDEN J. OF INT'L L. 313, 313–334 (2020).

two agreement, inspired by US dissatisfaction with the WTO Appellate Body rulings, is a focus on ownership and control in defining the coverage of SOE regulation.<sup>127</sup>

As for the regulation of subsidies, the absence of an independent authority or dispute settlement can hamper the effectiveness of negotiated commitments. Arguably this is the case, for instance, of rules on justification. From an EU perspective, the inclusion of rules on justifications similar to that modeled by Article 107 TFEU is a very important outcome of negotiations, because it ensures that values having a symbolic and foundational significance for the Union are considered by some partner countries as core elements of their models for society too.<sup>128</sup> Whether the promotion and inclusion of such exceptions that allow the granting of subsidies contributing to fundamental public goals and economic development ensure that the EU and its partner countries can effectively pursue these social and economic policy goals is debatable. Effectiveness indeed depends, first and foremost, on the existence and the functioning of mechanisms for the settlement of disputes concerning subsidy control. The lacking of such mechanisms means that compliance can now only be enforced at a political level. However, as scholars have observed, it is also worthy to mention that the fact that new EU PTAs exclude their subsidy clause from dispute settlements can prevent the risk of forum shopping, and potentially reduces the cost of the PTAs in terms of fragmentation.<sup>129</sup>

A last point of contention concerns the concept of prohibited subsidies. Whilst the EU has successfully negotiated the inclusion of two more categories (unlimited guarantees and subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan) it seems unclear why it does not succeed in also including the other two categories of prohibited subsidies (subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity; and certain direct forgiveness of debt) that are included in the 2020 Joint Statement of the Trilateral Initiative.<sup>130</sup>

### E. The EU Acting Unilaterally: The European Commission's Proposal on Foreign Subsidies

One might observe that the EU is already able to react unilaterally to unfair competition where products have been manufactured with the support of non-EU funding (anti-subsidy).<sup>131</sup> On the international level, until a few years ago, the EU could have surely brought litigation against a WTO Member for breaches of the SCM Agreement and have the matter adjudicated by a WTO panel. However, this possibility has failed since the end of 2019 due to the paralysis of the WTO Appellate Body and the virtual collapse of the entire WTO dispute settlement system. It must also be remembered that (even in case of revival of the system) the SCM Agreement only covers subsidized imports of goods from third countries. It does not apply to subsidies related to trade in services and in relation to the establishment and operation of undertakings in the EU which are backed by foreign subsidies.

Important regulatory gaps also appear with respect to EU rules. The EU's system of State aid control, enshrined in Articles 107 and 108 TFEU, does not apply in the case that non-EU

<sup>127</sup>The CPTPP defines, for instance, SOEs as for-profit entities with at least SDR 200 million annual turnover in which the government owns more than 50% of the shares of the SOE, has control through ownership interests of the exercise of more than 50% voting rights, or has the power to appoint most of the board members. See Hoekman & Sapir, *supra* note 60, at 213.

<sup>128</sup>Borlini & Dordi, *supra* note 79, at 585.

<sup>129</sup>See Lindenberg Schoueri & Owens, *supra* note 95, at 593; Borlini & Dordi, *supra* note 79, at 596–602.

<sup>130</sup>See 2020 Joint Statement, *supra* note 57.

<sup>131</sup>The measures to counteract the unfair practices usually take the form of *extra import duty* for the subsidization received by the foreign competitors to eliminate the injury.

authorities grant financial support to undertakings in the EU, either directly or through their parent companies outside the EU. Likewise, neither EU antitrust rules<sup>132</sup> nor EU merger control rules<sup>133</sup> specifically take into account whether an economic operator may have benefited from foreign subsidies (even if in principle it could form part of the assessment) and they do not allow the Commission (or Member States) to intervene and decide solely or even mainly on this basis. Also, the existing EU legal framework in the field of *public procurement* does not specifically address distortions to the EU procurement markets caused by foreign subsidies.<sup>134</sup> Finally, if it is true that the EU Regulation establishing a framework for the screening of *foreign direct investments* into the EU<sup>135</sup> undoubtedly constitutes an important tool to address risks to security or public order brought by foreign investments that target the EU's or Member States' critical assets; it is, nonetheless, true that the same Regulation does not specifically tackle the issue of distortions caused by foreign subsidies.

In June 2020, the Commission adopted a *White paper on levelling the playing field as regards foreign subsidies*,<sup>136</sup> to start a public debate on the topic of distortive foreign subsidies and further propose a possible solution at the EU level.<sup>137</sup> This initiative, which was conceived as part of the new updated “industrial strategy for Europe,”<sup>138</sup> moves from the assumption that openness to trade and investment, while part of resilience of the economy, must go hand-in-hand with fairness and predictable rules. Therefore, the *ratio* for adopting new unilateral tools to combat unfair trading practices is that a strong, open, and competitive single market would enable both Europeans and foreign companies to compete on merit *only in as far as a level playing field in the internal market is ensured*.<sup>139</sup>

This is not the first time that the EU is trying “to export” its rules and standards to other countries: This has already happened with its competition law and state aid rules,<sup>140</sup> data and privacy

<sup>132</sup>TFEU, *supra* note 18, at art. 101–102.

<sup>133</sup>See Council Regulation (EC) 139/2004 of Jan. 20, 2004, on the control of concentrations between undertakings, 2004 O.J. (L 24), 1 [hereinafter EUMR].

<sup>134</sup>See Commission Directive 2014/24/EU, 2014 O.J. (L 94) 65.

<sup>135</sup>Regulation (EU) 2019/452 of the European Parliament and of the Council of March 19, 2019 establishing a framework for the screening of foreign direct investments into the Union, 2019 O.J. (L 79I) 1.

<sup>136</sup>*White Paper on leveling the playing field as regards foreign subsidies*, COM (2020) 253 final (June 17, 2020) [hereinafter White Paper]. According to the Commission, trade openness in the current global economic environment is being challenged by state sponsored unfair trading practices, which according to the Commission “disregard market forces and abuse existing international rules, with a view to building up dominance across various sectors of economic activity . . .” Such unfair practices typically include “shielding industries from competition through selective market opening, licensing and other investment restrictions, as well as providing subsidies which undermine the level playing field to both state-owned and private sector companies. The distortive economic effects of such practices are relevant in any affected sector, whether strategic or otherwise . . .” The impact assessment underpinning the proposal was published by the Commission’s Regulatory Scrutiny Board, which issued a positive opinion with reservations on March 5, 2021 which was published with the proposed amendments in Annex 1.

<sup>137</sup>See *Amendments adopted by the European Parliament on 4 May 2022 on the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market* COM(2021)0223 – C9-0167/2021 – 2021/0114(COD) (Dec. 6, 2022) [hereinafter *Proposal for a regulation*]; see also Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, 21 EUR. STATE AID L. Q. 153, 153–172 (2022) (highlighting the Proposal does not fulfill the requirements regarding the use of Article 114 TFEU established in the Court’s case law despite its self-proclaimed goal of removing “distortions within the internal market” and that Article 352 TFEU would be a more plausible option).

<sup>138</sup>See *A new industrial strategy for Europe* COM(2020) 102 final (March 10, 2020).

<sup>139</sup>European Commission Memoranda SWD/2021/99 final, *Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market*, at 62 (May 5, 2021); Victor Crochet & Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, 20 WORLD TRADE REV. 343, 343–366 (2021) (discussing the growing concerns over foreign subsidies).

<sup>140</sup>See Michael Blauburger & Rilke Krämer, *European competition vs. global competitiveness: transferring EU rules on state aid and public procurement beyond Europe*, 13 J. OF INDUS., COMPETITION & TRADE 186 (2013).

rules (under the recent General Data Protection Regulation [GDPR]).<sup>141</sup> In light of the success of these EU foreign policy instruments, which proved able to force other countries and multinational companies to adopt EU rules and enter risk free into the large internal market,<sup>142</sup> EU policymakers have shown their increased willingness to further leverage access to the market also regarding foreign subsidies.

### 1. Key Elements of the Regulation

On June 30, 2022, the EU institutions reached a political agreement on a new regulation on foreign subsidies (FSR).<sup>143</sup> The agreement was built on the principle of economic sovereignty<sup>144</sup> and extremely rapidly – and this is easily understandable due to the broader and complex situation of the European economy, heavily affected first by the Covid-19 pandemic and more recently by the effects of the various economic sanctions adopted against Russia. It focuses on two main issues: Identifying distortive foreign subsidies and remedying the distortions they cause. The new regime clearly borrows elements from State aid, merger control, antitrust and trade defense by creating a new hybrid investigation tool. The Regulation will be formally adopted after the linguistic review and it is expected to enter into force by the end of 2022, which would mean that it will be applicable by mid-2023.

#### 1. Investigation of Financial Contributions

As to the scope of the new Regulation, the Commission will have the power to investigate financial contributions granted by non-EU governments (public authorities) to undertakings engaging in an economic activity in the EU by means of three tools:

- for *M&A* transactions, the regulation introduces a *notification-base (ex-ante) tool* where the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million and the transaction involves a foreign financial contribution of at least €50 million;<sup>145</sup>
- for *bids in public procurements*, the same *notification-base (ex-ante) tool* gives the Commission the power to investigate financial contribution by a non-EU government, where the estimated contract value is at least €250 million, and the bid involves a foreign financial contribution of at least €4 million per third country;<sup>146</sup>
- for *all other market situations*, the Commission possesses a *general tool* to investigate: It can start a review by its own initiative (*ex-officio*) or it can request an ad-hoc notification for smaller concentrations and public procurement procedure if it suspects the existence

<sup>141</sup>2016 O.J. (L 119) 1.

<sup>142</sup>See ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* 121 (2020) (noting that the EU rules on Data and Privacy have now become the “gold standard worldwide”).

<sup>143</sup>Council of the EU Press release, *Foreign subsidies distorting the internal market: provisional political agreement between the Council and the European Parliament* (June 30, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/>; see also Jay Modrall, *The EU Anti-Subsidy Regulation Enters Trilogue Negotiations – New Obligations for Multinationals Coming into Focus*, KLUWER COMPETITION L. BLOG (May 10, 2022), <http://competitionlawblog.kluwercompetitionlaw.com/2022/05/10/the-eu-anti-subsidy-regulation-enters-trilogue-negotiations-new-obligations-for-multinationals-coming-into-focus/>.

<sup>144</sup>Council of the EU Press Release, *supra* note 143 (“Economic sovereignty depends on two key principles: investment and protection. The agreement reached on this new instrument will make it possible to combat unfair competition from countries that grant massive subsidies to their industry. This is a major step towards protecting our economic interests . . .”).

<sup>145</sup>*Proposal for a regulation, supra* note 137, at art. 18.

<sup>146</sup>*Id.*, at art. 27.

of distortive subsidies. This would cover market situations such as greenfield investments and public procurements below the thresholds.<sup>147</sup>

Pending the Commission's review in the case of one of the two mentioned notification-based tools, the concentrations cannot be completed and the investigation bidder cannot be awarded the contract.

According to article 47 ("Transitional provisions"), the Regulation will apply to foreign subsidies granted in the *five years* prior to the date of its application where such foreign subsidies distort the internal market after the start of application of the Regulation. It shall also apply to foreign financial contributions granted in the *three years* prior to the date of its application where such foreign financial contributions were granted to an undertaking notifying a concentration or notifying financial contributions in the context of a *public procurement procedure* pursuant to this Regulation. Conversely, it shall not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before the date of application of the Regulation and to public procurement procedures initiated before the date of application of the Regulation.<sup>148</sup>

## 2. Foreign Subsidies and Financial Contributions

The concept of *foreign subsidy* and, by extension, the scope of the proposed Regulation, is very broad. It covers not only *direct financial contributions* (subsidies in the narrow sense) but all kinds of transfers of funds or liabilities (including capital injections, loans, loan guarantees, fiscal incentives, debt forgiveness, debt to equity swaps, etc.). It also covers the forgoing of revenue that is otherwise due (e.g., tax exemptions) and the provision of goods and services or the purchase of goods or services.<sup>149</sup> Like EU state aid law, the notion encompasses any *economic advantage* that the beneficiary would not be able to obtain under normal market conditions (the subsidy must confer a benefit to the company). Similar to the notion of State aid, the advantage must also be *selective*—granted only to an individual undertaking[s] or industry[ies]—directly or indirectly attributable to the State—the public authorities of the third country—and liable to distort competition in the internal market.

If a foreign contribution constitutes a foreign subsidy, the Commission shall further assess whether it "distorts the internal market." Article 3 of the proposed regulation contains a non-exhaustive list of indicators for this assessment, such as, among others, the amount and nature of the subsidy; the situation of the undertaking and the markets concerned; and the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

In addition, the Regulation sets out the categories of foreign subsidies that are considered either "most likely" or "unlikely" to distort the internal market. The former includes subsidies granted to ailing undertakings, subsidies granted in the form of unlimited guarantees, foreign subsidies enabling an undertaking to submit an unduly advantageous tender, foreign subsidies directly facilitating a transaction, or an export financing measure that is not in line with the OECD Arrangement on officially supported export credits. A foreign subsidy is considered "unlikely" to distort the internal market if its total amount does not exceed €5 million over any consecutive period of three financial years.<sup>150</sup>

<sup>147</sup>*Id.*, at art. 7.

<sup>148</sup>Contracts in the fields of defense and security and cases of extreme urgency are excluded from the notification-based tool obligation, but they are excluded from the financial contribution information and from the Commission's *ex officio* investigation powers.

<sup>149</sup>*Proposal for a regulation, supra* note 137, at art. 2.

<sup>150</sup>*Id.*, at art. 3.2 and 4.



### 3. *The Balancing Test and the Commission's Power under the Regulation*

The FSR contains in any case a sort of *escape clause*.<sup>151</sup> In case the Commission finds that a foreign subsidy actually distorts (or has the potential to distort) the internal market, it shall further assess whether the distortive effects may be counterbalanced or possibly even outweighed by positive effects “on the development of the relevant economic activity.”<sup>152</sup> The outcome of this “balancing test” shall be taken into account by the Commission when deciding whether to impose *redressive measures* or to accept *commitments*,<sup>153</sup> and the nature and level of those redressive measures or commitments.<sup>154</sup> Commitments and redressive measures should in any case fully and effectively remedy the distortion caused by the foreign subsidy in the internal market. Unfortunately, the current text seems to leave to the Commission an unlimited discretion in weighing the positive and negative effects of a foreign subsidy and in deciding what it deems to be appropriate. It is likely that the Commission will use the balancing test in a way that would ensure the equal treatment of recipients of foreign subsidies on the one hand, and recipients of State Aid granted by EU Member States on the other hand. However, this is not guaranteed, and a significant risk remains that foreign subsidies and their recipients may be held to stricter standards than the ones applicable under EU State Aid law.

The proposal for FSR gives the European Commission broad powers.<sup>155</sup> It would have extensive investigative powers to gather all necessary information, similar to those in anti-trust investigations. Furthermore, the Commission will have the power to carry out fact-finding visits at the undertaking, and, subject to agreement by the undertaking and the third country concerned, at the premises of the undertaking in the third country. It will have the power to launch market investigations; to impose *interim measures*; to accept commitments or impose redressive measures (such as reducing capacity/market presence, divestments, repayments of foreign subsidies, ordering the dissolution of a transaction, requiring the undertaking to adapt its governance structure, ordering the publication of R&D results, ordering the companies to refrain from making certain investments, etc.); and to approve or block deals. Finally, the regulation also provides the Commission with *punitive fiscal powers* (fines and periodic penalty payments) for failure to supply the requested information in a timely manner or for supplying incomplete, incorrect, or misleading information.<sup>156</sup>

In order to ensure uniform application of the regulation throughout the EU, the Commission will be exclusively competent in enforcing the regulation. Member States will be kept regularly informed and will be involved, through the advisory procedure, in decisions adopted under the regulation.

## II. *Impact on Business, Burden and Legal Uncertainties*

Even if the new regulation targets all companies—including EU-based companies—that have received support from third countries for any economic activity in the EU, it is not a secret that

<sup>151</sup>Jay Modrall, *The Anti-Subsidy Regulation: European Parliament and Council Clinch Last-Minute Deal*, KLUWER COMPETITION L. BLOG (July 11, 2022), <http://competitionlawblog.kluwercompetitionlaw.com/2022/07/11/the-anti-subsidy-regulation-european-parliament-and-council-clinch-last-minute-deal/>.

<sup>152</sup>See Morris Schonberg, *Substantive Assessment Issues and Open Questions*, 21 EUR. STATE AID L. Q. 143, 143–152 (2022) (discussing the key substantive assessments that the European Commission will need to consider when investigating foreign subsidies under the Regulation).

<sup>153</sup>*Proposal for a regulation, supra* note 137, at art. 6. According to the Preamble, recital 16: “The balancing may also lead to the conclusion that no redressive measures should be imposed. Categories of foreign subsidies that are deemed most likely to distort the internal market are less likely to have more positive than negative effects.”

<sup>154</sup>*Id.*, at art. 5.

<sup>155</sup>Smela Wolski, *supra* note 137 (exploring the possible legal basis of FSR and arguing that the Proposal does not fulfil the requirements regarding the use of Article 114 TFEU established in the Court’s case law despite its self-proclaimed goal of removing “distortions within the internal market” and that Article 352 TFEU would be a more plausible option).

<sup>156</sup>*Proposal for a regulation, supra* note 137, at art. 9–15.

the FRS has been conceived, in particular, keeping in mind Chinese SOEs engaging in M&A or bidding for government contracts in the EU.<sup>157</sup> The China Chamber of Commerce to the EU reacted to the FSR proposal stating that a new foreign subsidy regulation and other policies affecting Chinese companies “may further erode Chinese business confidence and create an unfair business environment for Chinese firms.”<sup>158</sup> Also the American Chamber of Commerce to the EU as well as groups representing Japanese, Korean and other businesses in Europe expressed concerns about how the regulation might affect their members in a recent joint statement.<sup>159</sup>

So far, the EU has been vague in saying which companies or sectors it will target, but a recent study enlightened which sectors will likely be in the spotlight.<sup>160</sup> Examples include food and agriculture, healthcare, and transport, which benefit from special incentives and legal regimes in many jurisdictions. Following the necessity to rapidly reduce its dependence on China and Russia, technology and energy have also become an absolute top priority for the EU. Special attention would be paid to basic metal companies, like the steel and aluminum industries that have struggled to survive since the imposition of President Trump’s unilateral tariffs. The metal industry—heavily subsidized by China—has, indeed, a strategic importance for crucial supply chains such as semiconductors, batteries, and renewable energies. In line with the *Global Gateway*, set out in December 2021 by the European Commission and the EU High Representative to counter China’s infrastructure initiative *Belt and Road*, infrastructure is also expected to be at the front and center of FSR.<sup>161</sup>

Among the pros of FSR, the decision to adopt an *ex-ante* approach in the case of large concentrations and public procurement procedures will ensure the systematic identification of distortive foreign subsidies so that measures can be decided *before* the transactions are closed. This will give legal certainty to the undertakings concerned. Nonetheless, the current proposal also raises concerns. First, there is the risk that the new regulation might negatively affect trade and investment flows. Many domestic and foreign companies doing business within the EU internal market will face a significant increase in costs and administrative burdens. This is because the FSR adds an additional layer of complexity to an already complicated regulatory landscape applicable to companies involved in mergers and acquisitions and public procurement in Europe, including those based in Europe and the U.S. multinationals. M&A transactions, for example, would be subject in the future to three different regulatory procedures – merger control, FDI screening and foreign subsidy control – with different filing requirements and timetables. They will need to design and implement new compliance procedures,<sup>162</sup> which could be costly and time-consuming. Also, the very broad definition of financial contributions, as well as the decision not to introduce into the FSR a *de minimis* exclusion for calculating financial contributions, in addition to the ample discretion the Commission has in running the balancing test between

<sup>157</sup>The EU concerns for state subsidies in China dated back to the EU antidumping and anti-subsidies investigations. See *Commission Staff Working Document on Significant Distortions in the Economy of the People’s Republic of China for the Purposes of Trade Defence Investigations*, SWD(2017) 483 final 2 (December 20, 2017),.

<sup>158</sup>Kim Mackrael, *EU Targets Foreign Subsidies, Aiming at China but Worrying U.S. Companies, Proposed legislation focuses mainly on state-backed companies*, WSJ (July 1, 2022), <https://www.wsj.com/articles/eu-targets-foreign-subsidies-aiming-at-china-but-worrying-u-s-companies-11656661297>.

<sup>159</sup>Jay Mordall, “Anti-Subsidy” Regulation – A New Big Stick in the EU Regulatory Arsenal, KLUWER COMPETITION L. BLOG (May 6, 2021), <http://competitionlawblog.kluwercompetitionlaw.com/2021/05/06/anti-subsidy-regulation-a-new-big-stick-in-the-eu-regulatory-arsenal/>.

<sup>160</sup>Simon Van Dorpe, *5 industries that need to watch foreign subsidies rules*, POLITICO (July 14, 2022), <https://www.politico.eu/article/five-industrie-need-watch-foreign-subsidies-rules/>.

<sup>161</sup>*The Global Gateway*, JOIN(2021) 30 final (Dec. 1, 2021).

<sup>162</sup>This is because the merger control systems both at the EU (EUMR) and national level, as well as the national rules of foreign trade law and investment control, will continue to apply. See *supra* note 133.

positive and negative effects of the foreign subsidies, contribute to creating what could be easily perceived as a significant legal uncertainty.<sup>163</sup>

Further, it must be checked whether the EU will be effectively able to collect evidence on foreign subsidies outside Europe to impose effective redressive measures.<sup>164</sup> Because these measures could only be adopted after a “full investigation,” there is a realist possibility that alleged offenders be incentivized to frustrate and delay it.<sup>165</sup> If the *deterrent effect* of the EU unilateral measures fails, companies might decide that it is more convenient for them to accept no-cooperation fines or periodic penalty payments rather than disclosing all data. This conclusion underscores the importance of EU subsequent unilateral *sanctions*, which should be in principle heavy enough to create real pressure on parties—companies and foreign countries—to cooperate. The issue, obviously, is not only economic but political. Ultimately, the strength of EU measures would depend, on the one hand, on the EU’s willingness to employ them, and, on the other hand, on the perception among foreign countries. In sum, the presence of this new regulation does not seem enough in itself to *dissuade* foreign states from subsidizing their companies. Because the degree of State intervention in the economy is one of the major pillars of social and economic policies, it is simply unrealistic to expect that foreign countries would easily accept, and import, external economic models, especially when they would run contrary to their national economic traditions. In other words, the effectiveness of FRS hinges on many factors beyond the European control.

## F. Conclusions

This contribution has attempted to sketch out some of the key legal and policy issues that are likely to determine the development of the EU’s Trade policy concerning rules on State intervention in the market, specifically on the role of subsidies and SOEs. The focus of our analysis has been on the relaxation of the usual State aid regime under Articles 107 and 108 TFEU to give Member States more flexibility in supporting their economies and strengthen EU industrial policy; the likelihood of EU proposals resulting in any substantial change to international trade law on subsidies and SOEs at the multilateral (WTO) level; a systemic horizontal investigation into the relevant trade rules promoted by the EU in its most recent practice of PTAs; and, finally, the EU pursuing stronger protection of its companies with its recently announced new regulation on foreign subsidies, on the basis of which the European Commission can investigate foreign subsidies and impose remedies.

At first sight, it may seem that the current evolution of EU trade policy approach to the legal regulation of subsidies and SOEs is inconsistent. On the one hand, the EU trade agenda emphasizes the importance of multilateralism and the rules-based international order, with a number of significant proposals for reforming the WTO and establishing new rules to avoid competitive distortions. On the other, the same goal is approached through a very aggressive unilateral trade strategy. In the middle of this apparently contradictory stance, the EU Commission is currently negotiating a number of PTAs thereby making partners—well beyond the circle of those

<sup>163</sup>Raymond Luja, *Countering State Aid Beyond the European Union*, 20 EUR. STATE AID L. Q. 187, 187–199 (2021) (recommending, *inter alia*, to clarify the concepts of “undertaking” and “interim measures,” to limit notification to selective subsidies in the context of tenders, and to restrict the retroactive effect of the notification requirement in light of the administrative burden involved. Further suggestions to increase consistency and legal certainty have been included as well).

<sup>164</sup>Jakub Kociubiński, *The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?*, 6 EUR. COMPETITION & REGUL. L. REV. 56, 56–68 (2022) (“neither administrative bodies, nor other companies acting as intermediaries between the government and the alleged beneficiary, or beneficiaries themselves, when they are not active on the Internal Market, cannot be directly bound by any obligations to disclose financial data, or by the accounting standards, stemming from the European law.”)

<sup>165</sup>*White Paper*, *supra* note 136, at 2.1.

countries that can traditionally be defined “European”— accept rules along the lines of European competition law.

At a closer look, both the unilateral and the multilateral approaches, with a very active agenda of bilateral negotiations in the middle, share, however, a common goal: the rationale is to redress the perceived *regulatory gaps* left by current EU competition law and trade defense rules. In brief, about the regulation of State intervention in the market, the EU trade policy’s different manifestations and normative initiatives we have examined move from the premise that a level playing field is a legitimate aspiration; indeed, a very important one in these peculiarly challenging times characterized by outstanding public support measures to deal with the economic impact of Covid-19 and the global economic crises following the recent European war between Russia and Ukraine.

This resulting more focused approach shows that the unilateral, bilateral, and multilateral approaches are indeed strictly intertwined. As observed earlier, the bilateral agenda is perceived by the EU Commission as a tool for tackling issues that are not ready for multilateral discussion, and thus PTAs are, in essence, an instrument to pave the way for the next level of multilateral liberalization. On the other hand, albeit not being a very *creative* way to tackle the potential distortions of competition by foreign-backed companies active in the EU, a unilateral posture remains the only feasible policy choice with respect to the limitations posed by international politics towards obtaining a political global consensus regarding a modernization of subsidies and SOEs rules at the multilateral (WTO) level.

Unilateral measures like those envisaged in the new FSR pose, however, a number of legal and policy challenges.<sup>166</sup> Among other things, the EU must consider the possibility of *reciprocal* responses eventually leading to a *retaliatory spiral*, especially in case the new Regulation will be perceived as a “protectionist” instrument. This could happen, for example, in the case the EU’s redressive measures go beyond what is strictly necessary to redress market distortions caused by foreign-backed companies, and tilt the level playing field. This event could lead to *another* trade conflict escalation, with each party punishing the other for actions perceived as hurtful. The ultimate question is whether this risk is in some way acceptable or desirable. It has been observed that unilateral actions, or their threatened use, have often played a critical role in the development of international norms. In our opinion, unilateral solutions should be seen in any case as a second-best choice in the absence of an (effective) multilateral system.<sup>167</sup>

In contrast to the Trump Administration’s ample and unjustified use of simple traditional unilateral trade measures, which eventually led to exacerbating the current global trade environment,<sup>168</sup> it is thus possible to interpret the new EU FSR as a “political signal” sent to the

<sup>166</sup>It is, perhaps, worthy to mention that the proposed regulation on foreign subsidies is just one of the many autonomous legal tools recently proposed by the Commission to combat unfair trade practices and pursue its interests where needed. On 8 December 2021, the European Commission published its *Proposal for a Regulation on the protection of the European Union and its Member States from economic coercion by third countries*, whose aim is to effectively protect the European Union and its Member States from coercive third-country measures affecting trade and investment. COM(2021) 775 final (Dec. 8, 2021). On 29 August 2022, the *Regulation (EU) 2022/1031 of the European Parliament and of the Council on the access of third-country economic operators, goods and services to the Union’s public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI)* has come into force. 2022 O.J. (L 173) 1 [hereinafter IPI]. The IPI will enable the Commission to impose measures limiting non-EU companies’ access to the EU public procurement market if these companies’ governments do not offer similar access to EU businesses.

<sup>167</sup>Victor Crochet & Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, 20 *WORLD TRADE REV.* 343, 343–366 (2021) (investigating whether foreign subsidies can instead be addressed under the existing rules of the World Trade Organization, and, if not, whether those rules allow States to take matters into their own hands and act unilaterally).

<sup>168</sup>See NERINA BOSCHIERO, *THE US TRADE POLICY, CHINA AND THE WTO* (2022).

world. Article 40 (7) of the FSR explicitly stipulates that international agreements concluded by the EU with foreign countries will take the *precedence* over the proposed regulation, where it identifies a pattern of distortive practices. Such *dialogue* should in principle be able to bring about a change in distortive subsidy practices and to restore fair competition within the EU, thus preventing it from adopting unilateral redressive measures. Is this not a strong signal from the EU to third countries that bilateral or multilateral trade agreements remain the best solution to reach a fair, predictable and consensual regime, able to guarantee legal certainty and foreign investments?<sup>169</sup>

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<sup>169</sup>Hoekman & Nelson *supra* note 4, at 12.